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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1953

No. 406

PETE HERNANDEZ, PETITIONER,

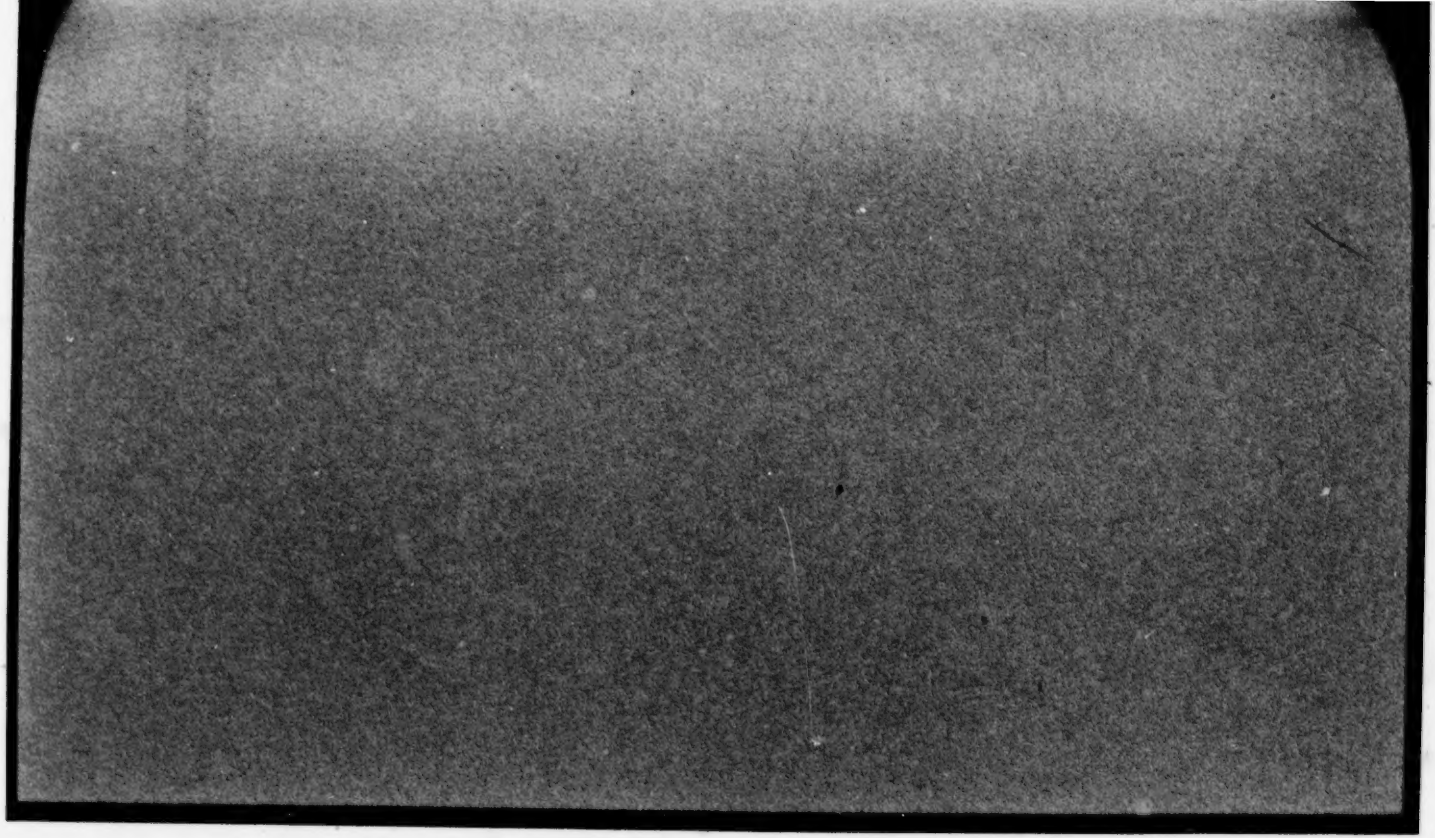
vs.

THE STATE OF TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

PETITION FOR CERTIORARI FILED JANUARY 21, 1953

CERTIORARI GRANTED OCTOBER 12, 1953



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INDEX

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[fols. 1-3] [Caption omitted]

IN THE 24TH DISTRICT COURT, JACKSON COUNTY, STATE OF TEXAS

THE STATE OF TEXAS

vs.

PETE HERNANDEZ

Charge—Murder

No. 2091

INDICTMENT—filed September 20, 1951

In the Name and by the Authority of the State of Texas:

The Grand Jurors, for the County of Jackson State aforesaid, duly selected, organized, sworn and empaneled as such at the Fall Term, A. D. 1951, of the District Court for said County, upon their oaths in said Court present that Pete Hernandez on or about the 4th day of August, A. D. one thousand nine hundred and fifty-one and anterior to the presentment of this Indictment, in the County of Jackson and State of Texas, did then and there unlawfully and voluntarily and with malice aforethought kill Joe Espinosa by shooting him with a gun, against the peace and dignity of the State.

W. F. Germer, Foreman of the Grand Jury.

[fol. 4] A True Bill—W. P. Germer, Foreman of Grand Jury. Names of Witnesses: Manuel Laureles—Jesus Jordan—Jesse Nava—John Tristan—Mike Pena—J. B. Arroyos—E. Sanchez—Manuel Garza—Alex Garza—Henry Cruz.

(File endorsement omitted.)

[fol. 5] IN DISTRICT COURT OF JACKSON COUNTY

[Title omitted]

MOTION TO QUASH INDICTMENT—filed October 4, 1951

To the Honorable Judge of Said Court:

Now comes Pete Hernandez, Defendant and moves the Court to set aside the Indictment in the above-styled and numbered cause for the following reasons:

1. In the selection of the Grand Jury Commissioners who subsequently appointed the Grand Jurors who returned this Indictment, Defendant was deprived of his Constitutional rights and denied the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. In the selection of the Grand Jurors who returned this Indictment defendant was likewise deprived of his Constitutional rights and the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

In substantiation of the foregoing grounds, Defendant embodies in this Motion the allegations heretofore set out in his Motion to Quash the Jury Panel, a copy of which is attached hereto and made a part hereof.

3. Defendant further states that there are persons permanently residing in Jackson County, Texas listed on the Tax rolls and Poll Tax rolls of said County for the year 1951 who are qualified for Jury Commission and Grand Jury Service.

4. Defendant further states that approximately twenty-five per cent (25 per cent) of the population of Jackson County consists of persons of Mexican descent who are members of Defendant's class and of the same national origin and who are considered as members of a separate race by the other residents and citizens of said Jackson County.

5. Defendant further states that this is the first opportunity that he has had to raise the issue of his Constitu-
[fol. 6] tional rights as to the selection of the members of

Jury Commission and the members of the Grand Jury because both the Jury Commissioners and said Grand Jury have been selected prior to the Commission of the alleged offense averred in this Indictment.

Gus C. Garcia, Attorney for Defendant.

Overruled, 10-4-51, Frank W. Martin, Deft Excepts.

(File endorsement omitted.)

[fol. 7] In the District Court of Jackson County, Texas
Motion to Quash Jury Panel—filed October 4, 1951

Now comes Pete Hernandez, Defendant in the above-styled and numbered cause and files this, his motion to quash the entire panel of petit jurors selected by the Jury Commissioners for the following reasons:

I

The said panel was improperly selected in that from said Grand Jury Commissioners all persons were excluded who are of Mexican or Latin American descent or belonging to a class known as "Mexicans". That the Defendant herein is of Mexican descent and that persons of his national origin or class have been systematically, intentionally and deliberately excluded from Jury Commissions and Grand Juries. That there are persons of the Defendant's national origin or class who are citizens of Jackson County, Texas and are qualified to serve as Jury Commissioners but they have never been given an opportunity to do so and that the Defendant has been denied and is being denied the equal protection of the laws.

II

In support of the foregoing Defendant would show the Court that people of his national origin or class are, on the whole, of a low economic level and considered members of a distinct race, separate and apart from the other citizens of Jackson County and that by reason of this fact Defendant is not afforded a trial by jury of his peers, and is deprived

of his constitutional rights guaranteed by the Fourteenth Amendment to the Federal Constitution.

III

Defendant would further show the Court that not only are persons of Mexican descent excluded from the Jury Commission but that they are otherwise treated as members of an inferior race, are denied services in many public places in Jackson County and for many years chil- [fol. 8] dren of said national origin or class were segregated in the public schools of Jackson County, just as if they were members of a different race.

IV

Defendant would further show the Court that he has not heretofore had an opportunity to challenge the selection of the Jury Commissioners or the Jury Panel by them selected because said Commissioner and the Jury Panel were named anterior to the Commission of the alleged offense charged in the Indictment.

Gus C. Garcia, Attorney for Defendant, 433 International Building, San Antonio, Texas.

Order Overruling Motion to Quash Jury Panel

On this the 24th day of September, A. D. 1951 came on to be heard Defendant's Motion to Quash the Jury Panel. The Court is of the opinion that said motion should be, and is hereby, overruled. It is ordered that Defendant shall be afforded the opportunity to offer evidence in support of his allegations in this motion upon a hearing of Defendant's Motion to Quash the Indictment.

—— ——, Judge Presiding.

(File endorsement omitted.)

[fol. 9] In District Court of Jackson County

[Title omitted]

Order Overruling Motion to Quash the Indictment—October 4, 1951

On this the 4th day of October, 1951, came on to be heard the motion of the defendant, Pete Hernandez, to quash the indictment in this cause, and came into open court the defendant in person and his counsel and the District Attorney appeared for the State, and all parties announced ready, whereupon the evidence was presented by both sides and thereafter the Court heard the argument of counsel on such motion, and, after due consideration, the Court is of the opinion that such motion should be in all things overruled.

Therefore, it is hereby ordered and decreed by the Court on this the 4th day of October 1951, that defendant's motion to quash the indictment in this cause be, and the same is hereby, in all things overruled. To which ruling of the Court the defendant then and there in open court excepted.

Frank W. Martin, Judge Presiding.

[fol. 10] In District Court of Jackson County

[Title omitted]

Motion to Quash Jury Panel—filed September 24, 1951

Now comes Pete Hernandez, Defendant in the above-styled and numbered cause and files this, his motion to quash the entire panel of petit jurors selected by the Jury Commission*drs* for the following reasons:

I

The said panel was improperly selected in that from said Grand Jury Commissioners all persons were excluded who are of Mexican or Latin American descent or belonging to a class known as "Mexicans". That the Defendant herein is of Mexican descent and that persons of his national

origin or class have been systematically, intentionally and deliberately excluded from Jury Commissions and Grand Juries. That there are persons of the Defendant's national origin or class who are citizens of Jackson County, Texas, and are qualified to serve as Jury Commissioners but they have never been given an opportunity to do so and that the Defendant has been denied and is being denied the equal protection of the laws.

II

In support of the foregoing Defendant would show the Court that people of his national origin or class are, on the whole, of a low economic level and considered members of a distinct race, separate and apart from the other citizens of Jackson County and that by reason of this fact Defendant is not afforded a trial by jury of his peers, and is deprived of his constitutional rights guaranteed by the Fourteenth Amendment to the Federal Constitution.

III

Defendant would further show the Court that not only are persons of Mexican descent excluded from the Jury Commission but that they are otherwise treated as members of an inferior race, are denied services in many public places [fol. 11] in Jackson County and for many years children of said national origin or class were segregated in the public schools of Jackson County, just as if they were members of a different race.

IV

Defendant would further show the Court that he has not heretofore had an opportunity to challenge the selection of the Jury Commissioners or the Jury Panel by them selected because said Commissioner and the Jury Panel were named anterior to the Commission of the alleged offense charged in the Indictment.

Gus C. Garcia, Attorney for Defendant, 433 International Building, San Antonio, Texas.

10-4-51, Overruled, Deft Excepts, Frank W. Martin, Judge.

ORDER OVERRULING MOTION TO QUASH JURY PANEL

On this the 24th day of September, A. D. 1951, came on to be heard Defendant's Motion to Quash the Jury Panel. The Court is of the opinion that said motion should be, and is hereby, overruled. It is ordered that Defendant shall be afforded the opportunity to offer evidence in support of his allegations in this motion upon a hearing of Defendant's Motion to Quash the Indictment.

—— ——, Judge Presiding.

(File endorsement omitted.)

[fol. 12] IN DISTRICT COURT OF JACKSON COUNTY

[Title omitted]

ORDER OVERRULING MOTION TO QUASH JURY PANEL AND SPECIAL VENIRE—October 4, 1951

On this 4th day of October, 1951, came on to be heard the motion of the defendant, Pete Hernandes, to quash the jury panel and special venire ordered in this cause, and came into open court the defendant in person and his counsel and the District Attorney appeared for the State, and all parties announced ready, whereupon the evidence was presented by both sides and thereafter the Court heard the argument of counsel on such motion, and, after due consideration, the Court is of the opinion that such motion should be in all things overruled.

Therefore, it is hereby Ordered and Decreed by the Court on this the 4th day of October, 1951, that defendant's motion to quash the jury panel and special venire in this cause be, and the same is hereby, in all things overruled. To which ruling of the Court the defendant then and there in open court excepted.

Frank W. Martin, Judge Presiding.

[fol. 13] In District Court of Jackson County

[Title omitted]

Application for Suspended Sentence—filed October 8, 1951

Offense—Murder

To the Hon. Frank Martin, Judge of said Court:

Now comes the defendant in the above styled and numbered cause, and shows to the Court:

That he stands charged by indictment with a felony, to-wit: Murder which is one of the felonies to which the suspended sentence act applies.

He further shows to the Court that he has never heretofore been convicted of a felony in this or any other State.

Therefore defendant respectfully requests the Court to submit the issue of suspended sentence to the Jury, and allow the introduction of evidence of the facts herein alleged, and of the character of the defendant.

If the Jury finds defendant guilty of the offense with which he is charged, and assesses his punishment at confinement in the penitentiary for five years or less, and further find that he has never heretofore been convicted of felony in this or any other state, and recommend the suspension of such sentence, that said sentence be suspended.

Pete Hernandez, Defendant.

Duly sworn to by Pete Hernandez. Jurat omitted in printing.

[fol. 14] (File endorsement omitted.)

[fol. 15] In District Court of Jackson County

[Title omitted]

Charge of the Court—filed October 11, 1951

Gentlemen of the Jury:

(1) The defendant, Pete Hernandez, stands charged by indictment with the offense of murder of Joe Espinosa,

alleged to have been committed in Jackson County, Texas, on or about the 4th day of August, 1951.

(2) To this charge the defendant has pleaded "not guilty".

(3) As to the law of the case I charge you as follows:

(4) Whoever shall voluntarily kill any person within this State shall be guilty of murder. Murder shall be distinguished from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide or which excuse or justify the killing.

(5) Murder, as above defined, may be committed either with or without malice aforethought. When murder is committed with malice aforethought the punishment for such murder shall be death or confinement in the penitentiary for life or for any term of years not less than two. When murder is committed, but not with malice aforethought, the punishment for such murder is by confinement in the penitentiary for not less than two nor more than five years.

(6) "Malice aforethought" is the voluntary and intentional doing of an unlawful act by one of sound memory and discretion with the purpose, means and ability to commit the reasonable and probable consequences of the act. It is a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken.

(7) "Malice", in its legal sense, denotes a wrongful act done intentionally and without just cause or excuse.

[fol. 16] (8) A "deadly weapon" is a weapon which, from the manner used, is calculated or likely to produce death or serious bodily injury.

(9) Now, if you believe from the evidence beyond a reasonable doubt that the defendant, Pete Hernandez, in Jackson County, Texas, on or about August 4, 1951, with malice aforethought, as that term has heretofore been defined, and with the intent then and there to kill the said Joe Espinosa, did unlawfully and voluntarily kill Joe Espinosa by then and there shooting him, the said Joe Espinosa, with a gun, which, from the manner used, was calculated or likely to produce death or serious bodily injury, and as alleged in the indictment, then you will find the defendant guilty of murder with malice aforethought

and so state in your verdict, and assess his punishment at death or at confinement in the penitentiary for life or for any term of years not less than two.

(10) You are instructed that should you find the defendant guilty of murder, yet unless you believe from all the facts and circumstances in evidence beyond a reasonable doubt that the defendant in killing the deceased, if he did kill him, acted with malice aforethought, then you cannot assess any punishment against the defendant for a longer period than five years in the penitentiary.

(11) If you find from the evidence beyond a reasonable doubt that the defendant under the instructions given in this charge and under the facts and circumstances in evidence is guilty of murder, but should you have a reasonable doubt as to whether the defendant, in committing the offense, was prompted by malice aforethought, you should resolve that reasonable doubt in favor of the defendant, and in such case the punishment assessed by you for such offense, if any, cannot be for a longer period than five years in the penitentiary.

(12) And in this connection you are instructed that murder without malice is a voluntary homicide committed without justification or excuse under the immediate influence of a sudden passion arising from an adequate cause, by which it is meant such cause as would commonly produce [fol. 17] a degree of anger, rage, resentment or terror in in a person of ordinary temper sufficient to render the mind incapable of cool reflection.

(13) Now, if you believe from the evidence beyond a reasonable doubt that the defendant, Pete Hernandez, on or about August 4, 1951, in Jackson County, Texas, with the intent then and there to kill Joe Espinosa, did unlawfully and voluntarily kill the said Joe Espinosa by shooting him with a gun which from the manner used was calculated or likely to produce death or serious bodily injury and as alleged in the indictment, but if you believe from the evidence, or if you have a reasonable doubt thereof, that at the time the defendant killed the deceased, if you find he did kill him, the defendant was laboring under the immediate influence of a sudden passion, such as anger, rage, resentment or terror, which rendered his mind in-

capable of cool reflection, and that such condition of his mind, if any, was brought about by circumstances or conditions which would commonly produce such a state of mind in a person of ordinary temper, then you will find the defendant guilty of murder without malice and so state in your verdict, and assess his punishment at confinement in the penitentiary for not less than two nor more than five years.

(14) And unless you believe from the evidence beyond a reasonable doubt that the defendant is guilty of murder as hereinbefore explained and defined to you, then you will acquit the defendant.

(15) You are instructed that when a person is unlawfully attacked or threatened with attack by another and there is thereby created in the mind of the person attacked or threatened with an attack from the words, acts or conduct of the one making or threatening such unlawful attack a reasonable expectation or fear of death or serious bodily injury, as viewed from his standpoint at the time, then the law excuses or justifies such person in resorting to any means at his command to prevent his assailant from taking his life or from inflicting upon him any serious bodily [fol. 18] injury, and it is not necessary that there should be actual danger, as a person has the right to defend his life and person from apparent danger as fully and to the same extent as he would had the danger been real, provided he acted upon a reasonable apprehension of danger as it appeared to him from his standpoint at the time, and in such case the person acting under real or apparent danger is in no event bound to retreat in order to avoid the necessity of killing his assailant, but may stand his ground and defend himself by any means at his command.

(16) Now, if you believe from the evidence beyond a reasonable doubt that the defendant, Pete Hernandez, killed the deceased, Joe Espinosa, by shooting him with a gun, but if you believe from the evidence, or if you have a reasonable doubt thereof, that at such time the deceased, Joe Espinosa, was making or about to make what appeared to the defendant, as viewed from his standpoint at the time, taking into consideration the relative sizes and strength of the parties and defendant's knowledge or be-

lief of the character or disposition of the deceased, and any other fact and circumstance in evidence, to be an unlawful attack upon him, the defendant, producing a reasonable belief in the defendant's mind from the words, acts or conduct of the said Joe Espinosa at the time that he, the defendant, was in danger of losing his life or suffering serious bodily injury at the hands of the said Joe Espinosa, and if you find that the defendant killed the deceased under such circumstances, or if you have a reasonable doubt thereof, then you will acquit the defendant.

(17) You are further instructed when there is more than one assailant, the slayer has the right to act upon the hostile demonstration of either one or all of them and to kill either one of them, if it reasonably appears to him that they are present for the purpose of acting together to take his life or to do him serious bodily injury.

(18) You are further instructed that if you believe from the evidence, or if you have a reasonable doubt thereof, [fol. 19] that at the time of the difficulty between the parties here involved and prior to the shooting of Joe Espinosa by the defendant, if you find that Joe Espinosa was shot by the defendant, Henry Cruz was making or about to make what appeared to the defendant, as viewed from his standpoint at the time, taking into consideration the relative sizes and strength of the parties and the defendant's knowledge or belief of the character or disposition of Henry Cruz, to be an unlawful attack upon him, the said defendant, producing a reasonable belief in the defendant's mind from the words, acts or conduct of the said Henry Cruz at the time that he, the said defendant, was in danger of losing his life or suffering serious bodily injury at the hands of the said Henry Cruz, and that while the said Henry Cruz was making or about to make what appeared to the defendant, as viewed from his standpoint at the time, to be said unlawful attack or threatened attack, Joe Espinosa joined in what appeared to the defendant, viewed from his standpoint at the time, to be said attack or threatened attack, then the defendant had a right to defend himself against such attacks of the said Henry Cruz and Joe Espinosa, or either of them, and had a right under such circumstances to kill the said Joe

Espinosa, and if you find from the evidence, or if you have a reasonable doubt thereof, that Joe Espinosa was killed under such circumstances, then you will acquit the defendant.

(19) The defendant in this case has filed an affidavit with the Court among other things stating that he has never been convicted of a felony in this State, or any other State, and in the event of his conviction, he prays that you will recommend a suspension of his sentence.

(20) Our statute provides that where a person is charged with the offense of murder and the jury finds him guilty and assesses the punishment at imprisonment in the penitentiary for any term not more than five years, and they further find that the defendant has never been convicted of a felony in this State or in any other State, the jury may cause the sentence to be suspended during the good be-
[fol. 20] havior of the defendant.

(21) Now, if you find the defendant guilty of murder and the punishment assessed by you is for not more than five years, and you further find that he has never been convicted of a felony in this State or in any other State, you may, in your discretion, cause the sentence to be suspended during the good behavior of the defendant, and in case you desire to suspend the sentence of this defendant let your verdict show that you find the defendant has never been convicted of a felony in this State or any other State, and further show that you recommend the suspension of the sentence. You are instructed that the plea for suspended sentence filed herein is no evidence of defendant's guilt, and you must not consider same as evidence of his guilt.

(22) The indictment in this case is no evidence of defendant's guilt, and you will not consider the indictment nor the fact that defendant has been indicted as any evidence in the case, but you will wholly disregard the same, and pass upon the guilt or innocence of the defendant wholly and solely from the evidence given before you in the trial of this case, and the law as given in the Court's charge.

(23) In all criminal cases the burden of proof is upon the State.

(24) The defendant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt; and in case you have a reasonable doubt as to the defendant's guilt you will acquit him, and say by your verdict "not guilty".

(25) You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given their testimony, but you are bound to receive the law from the Court, which is herein given you, and be governed thereby.

Frank W. Martin, Judge Presiding.

You will find attached hereto for your convenience every [fol. 21] possible form of verdict which you can render under the evidence and law of this case. However, these forms are submitted purely and solely for your use and convenience in the event you reach a verdict, and shall not be considered or used by you for any other purpose.

In the event you use one of these forms in returning your verdict, have your foreman sign on the line at the bottom of the form which you use and scratch a line through all the remaining forms which you do not use.

Frank W. Martin, Judge Presiding, 24th District Court of Jackson County, Texas.

(1) We, the jury, find the defendant, Pete Hernandez, not guilty,

—— ——, Foreman.

(2) We, the jury, find the defendant, Pete Hernandez, guilty of murder without malice as charged in the indictment, and assess his punishment at —— years in the State Penitentiary.

—— ——, Foreman.

(3) We, the jury, find the defendant, Pete Hernandez, guilty of murder with malice aforethought as charged in the indictment, and assess his punishment at —— years in the State Penitentiary.

—— ——, Foreman.

(4) We, the jury, find the defendant, Pete Hernandez, guilty of murder with malice aforethought as charged in the

indictment, and assess his punishment at imprisonment in the State Penitentiary for life.

—— ——, Foreman.

(5) We, the jury, find the defendant, Pete Hernandez, guilty of murder with malice aforethought as charged in the indictment, and assess his punishment at death.

—— ——, Foreman.

(6) We, the jury, find the defendant, Pete Hernandez, [fol. 22] guilty of murder without malice and assess his punishment at —— Years in the penitentiary. We further find that the defendant has never been convicted of a felony in this or any other State, and recommend his sentence be suspended.

—— ——, Foreman.

(7) We, the jury, find the defendant, Pete Hernandez, guilty of murder with malice aforethought and assess his punishment at —— years in the penitentiary. We further find that the defendant has never been convicted of a felony in this or any other State, and recommend his sentence be suspended.

—— ——, Foreman.

(File endorsement omitted.)

[fol. 23] In District Court of Jackson County

[Title omitted]

Notation on Judge's Trial Docket

9-24-51. Case set for trial at 9:00 A. M. Monday, October 8, 1951. Clerk instructed to draw special venire of 130 men to be summoned by mail to appear in Court in Edna at 10:00 o'clock A. M. Monday, October 8, 1951. Writ returnable Thursday, October 4, 1951, at 12:00 o'clock noon.

10-4-51. Defendant & State announce ready on all motions. Defendant presents motions to quash indictment and special venire. Court hears testimony on motions. Motion by defendant to change venue offered—both sides

present evidence. Motion to quash venire overruled. Motion to quash indictment overruled. Motion to change venue overruled.

10-8-51. Case called, both sides announce ready. Begin voir dire examination jurors 1:30 P. M.

10-9-51. Special venire exhausted 5 P. M. Sheriff ordered to summon 12 talesman to complete panel.

10-11-51. Evidence completed both sides rest at 11 A. M.

10-11-51. Charge read to jury 1:15 P. M.

10-11-51. Argument commenced 1:25 P. M.

10-11-51. Jury received case at 4:30 P. M.

10-11-51. Verdict received at 8 P. M. Jury Discharged.

12-15-51. Defendant files amended motion for new trial with leave of Court-Motion new trial heard & overruled deft excepts gives notice of Appeal to Court of Criminal Appeals at Austin, Tex.

[fol. 24] In District Court of Jackson County

[Title omitted]

Verdict of the Jury—Filed October 11, 1951

(4) We, the jury, find the defendant, Pete Hernandez, guilty of murder with malice aforethought as charged in the indictment, and assess his punishment at imprisonment in the State Penitentiary for life.

H. S. Woodland, Foreman.

(File endorsement omitted.)

[fol. 25] IN THE DISTRICT COURT, 24TH JUDICIAL DISTRICT
JACKSON COUNTY, TEXAS

No. 2091

THE STATE OF TEXAS

vs.

PETE HERNANDEZ

Charge: Murder

JUDGMENT—October 8, 1951

This day, October 8, 1951, this cause was called for trial, and the State appeared by her District Attorney, Wayne L. Hartman, the County Attorney, Cullen B. Vance, and the employed Counsel, Wm. H. Hamblen, and the Defendant, Pete Hernandez, appeared in person, in open Court, his Counsel Gus C. Garcia and John J. Herrera, also being present, and both parties announced ready for trial, and the Defendant, Pete Hernandez, being duly arraigned in open Court pleaded not guilty to the charge contained in the indictment herein, to-wit murder with malice; thereupon a jury, of good and lawful men, to-wit, H. S. Woodland and eleven others, was duly selected, impaneled, and sworn, who, having heard the indictment read, and the defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired on October 11, 1951, in charge of the proper officer to consider of their verdict, and afterward, on the same day, October 11, 1951, were brought into open court by the proper officer, the defendant and his counsel being present, and being asked if they had agreed upon a verdict, answered they had, and returned to the court a verdict which was read aloud by the clerk; and thereupon the defendant asked that the jury be polled, and the name of each juror was then separately called, and each juror as his name was called was asked by the Court if the said verdict was his verdict and each of said jurors answered in the affirmative; whereupon the said verdict was received by the court and is here now entered upon the minutes as follows:

"We, the jury, find the defendant, Pete Hernandez, guilty of murder with malice aforethought as charged in the indictment, and assess his punishment at imprisonment in the State Penitentiary for life.

H. S. Woodland, Foreman."

[fol. 26] It is therefore considered and adjudged by the court that the defendant, Pete Hernandez, is guilty of the offense of Murder, with malice aforethought, as found by the jury, and that he be punished as has been determined by the jury, by confinement in the penitentiary for a term of his natural life, and that the State of Texas do have and recover of the said defendant, Pete Hernandez, all costs in this prosecution expended, for which execution will issue; and that the said defendant be remanded to jail to await the further order of this court herein.

[fol. 27] In District Court of Jackson County

[Title omitted]

Motion for New Trial—Filed October 11, 1951

Now comes Pete Hernandez, Defendant, and files this his Original Motion for New Trial, on the following grounds:

1. The verdict is against the law.
a. The verdict is against the evidence.

Gus C. Garcia, Attorney for Defendant.

(File endorsement omitted.)

[fol. 28] In District Court of Jackson County

[Title Omitted]

Amended Motion for a New Trial—Filed December 15, 1951

To the Honorable Judge of said Court:

Now comes Pete Hernandez, Defendant, and files this, his Amended Motion for a New Trial, leave of Court having

been first had and obtained, and says that the Court erred in overruling the following motions filed and urged by Defendant herein:

I. *Motion to Quash Jury Panel*

Now comes Pete Hernandez, Defendant in the above-styled and numbered cause and files this, his motion to quash the entire panel of petit jurors selected by the Jury Commissioners for the following reasons:

I

The said panel was improperly selected in that from said Grand Jury Commissioners all persons were excluded who are of Mexican or Latin American descent or belonging to a class known as "Mexicans." That the defendant herein is of Mexican descent and that persons of his national origin or class have been systematically, intentionally and deliberately excluded from Jury Commissions and Grand Juries. That there are persons of the Defendant's national origin or class who are citizens of Jackson County, Texas and are qualified to serve as Jury Commissioners but they have never been given an opportunity to do so and that the Defendant has been denied and is being denied the equal protection of the law.

II

In support of the foregoing Defendant would show the Court that people of his national origin or class are, on the whole, of a low economic level and considered members of a distinct race, separate and apart from the other citizens of Jackson County and that by reason of this fact Defendant is not afforded a trial by jury of his peers, and is deprived of his constitutional rights guaranteed by [fol. 29] the Fourteenth Amendment to the Federal Constitution.

III

Defendant would further show the Court that not only are persons of Mexican descent excluded from the Jury Commission but that they are otherwise treated as members of an inferior race, are denied services in many public

places in Jackson County and for many years children of said national origin or class were segregated in the public schools of Jackson County, just as if they were members of a different race.

IV

Defendant would further show the Court that he has not heretofore had an opportunity to challenge the selection of the Jury Commissioners or the Jury Panel by them selected because said Commissioner- and the Jury Panel were named anterior to the Commission of the alleged offense charged in the Indictment.

(S.) Gus C. Garcia, Attorney for Defendant, 433 International Building, San Antonio, Texas.

II. *Motion to Quash Indictment*

Now comes Pete Hernandez, Defendant, and moves the Court to set aside the Indictment in the above-styled and numbered cause for the following reasons:

1. In the selection of the Grand Jury Commissioners who subsequently appointed the Grand Jurors who returned this Indictment, Defendant was deprived of his Constitutional rights and denied the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. In the selection of the Grand Jurors who returned this Indictment Defendant was likewise deprived of his Constitutional rights and the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

In substantiation of the foregoing grounds, Defendant embodies in this Motion the allegations heretofore set out [fol. 30] in his Motion to Quash the Jury Panel, a copy of which is attached hereto and made a part hereof.

3. Defendant further states that there are persons permanently residing in Jackson County, Texas listed on the Tax rolls and Poll Tax rolls of said County for the year 1951 who are qualified for Jury Commission and Grand Jury Service.

4. Defendant further states that approximately twenty-five per cent (25 per cent) of the population of Jackson County consists of persons of Mexican descent who are members of Defendant's class and of the same national origin and who are considered as members of a separate race by the other residents and citizens of said Jackson County.

5. Defendant further states that this is the first opportunity that he has had to raise the issue of his Constitutional rights as to the selection of the members of Jury Commission and the members of the Grand Jury because both the Jury Commissioners and said Grand Jury have been selected prior to the Commission of the alleged offense averred in this Indictment.

(S.) Gus C. Garcia, Attorney for Defendant.

Wherefore, Defendant prays that he be granted a new trial.

Gus C. Garcia, Attorney for Defendant, 433 International Building, San Antonio, Texas.

A copy of this Amended Motion for a New Trial has been mailed to Honorable Wayne Hartman, District Attorney, Cuero, Texas.

(File endorsement omitted.)

[fol. 31] In District Court of Jackson County

[Title omitted]

Order of Court Overruling Amended Motion to Grant A New Trial

This the 15th day of December, 1951, came on to be heard the amended motion of the defendant, Pete Hernandez, to set aside the verdict and judgment herein rendered, and grant him a new trial of this cause; and the State being present in court by her District Attorney, and the defendant, Pete Hernandez, and also his attorney of record, John J. Herrera, being present in court in person, and the Court having heard the said motion is of the opinion that same should be refused.

It is, therefore, Considered, Ordered and Adjudged by the Court that the said amended motion for a new trial herein be and the same is refused, and in all things overruled. Whereupon the defendant, Pete Hernandez, in open court, excepted to such judgment and gave notice of an appeal herein to the Court of Criminal Appeals of the State of Texas, sitting at Austin, Texas, which said notice is here now entered of record.

Defendant shall have the time prescribed by law for filing bills of exception and Statement of facts in the lower court.

Duly entered this the 15th day of December, A. D. 1951.

Frank W. Martin, Acting Judge, 24th Judicial District of Texas.

[fol. 32] In District Court of Jackson County

[Title omitted]

Sentence—December 15, 1951

Charge: Murder

This day, December 15, 1951, this cause being again called, the State appeared by her District Attorney, and the Defendant, Pete Hernandez, was brought into open Court, in person, in charge of the Sheriff, and his counsel also being present, for the purpose of having the sentence of the law pronounced in accordance with the verdict and judgment herein rendered and entered against him on the 11th day of October, A. D. 1951. And thereupon the Defendant, Pete Hernandez, was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of said Defendant, Pete Hernandez, to pronounce sentence against him as follows:

It is the order of the Court that the Defendant, Pete Hernandez, who has been adjudged to be guilty of Murder with malice aforethought, be delivered by the Sheriff of Jackson County, Texas, immediately to the Superintendent of Penitentiaries or other persons authorized to receive such convicts, and the said Pete Hernandez shall be con-

fined in the said Penitentiary for a term of not less than two years nor more than his natural life, in accordance with the provisions of the law governing the Penitentiaries of this State, and the said Pete Hernandez is remanded to Jail until said Sheriff can obey the directions of this Sentence.

But the defendant, Pete Hernandez, having this 15th day of December, 1951 excepted to the Order of the Court in overruling his First Amended Motion for a new trial, and having given notice of appeal to the Court of Criminal Appeals of the State of Texas, this sentence is ordered suspended and held in abeyance until said appeal has been decided, and until the mandate of the Court of Criminal Appeals of the State of Texas has been received and filed in this Court.

[fol. 33] In District Court of Jackson County

Copy of Letter Written by Frank W. Martin, Judge, 135th District Court to Mr. Gus C. Garcia—Filed January 17, 1952

Frank W. Martin
District Judge
135th Judicial District
Goliad, Texas

January 16, 1952

Counties
Calhoun
De Witt
Goliad
Jackson
Refugio
Victoria

Mr. Gus C. Garcia,
c/o Garcia and Cadena,
432 International Building,
San Antonio, Texas.

Dear Mr. Garcia:

You called me a few days ago with reference to the Pete Hernandez case at Edna. I have since communicated

with Mr. Otto Kehrer, the reporter, and he advised me that he has not received an order for a statement of facts. I presume that you will want a statement of facts of some of the testimony anyway, and in that connection I call your attention to the Session Laws of the 52nd Legislature providing that the attorney for the appellant shall file within 15 days after notice of appeal is given and request is made of the official court reporter for the preparation of transcript of all or any part of the evidence desired, and shall specify the portions desired in narrative form, if any, and the portions desired in question and answer form, if any, and the portions that are desired to be omitted.

In view of the fact that Mr. Kehrer stays very busy he is not always able to get up a statement of facts within a few days, and if you desire a statement of facts in the cause mentioned above, I would suggest that you now make satisfactory arrangements with Mr. Kehrer for the statement of facts to be furnished, and this particularly in view of the fact that over 30 days has now elapsed since the motion for new trial was overruled.

Yours very truly, Frank W. Martin, Judge, 135th District Court.

FWM/ph.

cc: Miss Gena Lee Lawrence, Clerk, District Court, Edna, Texas; Mr. Otto Kehrer, Victoria, Texas.

Dear Mrs. Lawrence: Please file the copy of this letter in the papers of the Pete Hernandez case upon the date received by you.

FWM.

(File endorsement omitted.)

[fol. 34] In District Court of Jackson County

Copy of Letter Written by O. G. Kehrer to Mr. Gus C. Garcia—filed March 10, 1952

Victoria, Texas, January 30, 1952

Via Registered Mail—Return Receipt Requested

Mr. Gus C. Garcia,
Attorney at Law,
432 International Building,
San Antonio, Texas.

Dear Mr. Garcia:

Re: Cause No. 2091, The State of Texas versus Pete Hernandez, In the 24th District Court of Jackson County, Texas.

In compliance with your request by long distance telephone on the afternoon of January 18, 1952, that I prepare statement of facts, in question and answer form, in the above numbered and entitled cause in so far only as it relates to (1) Defendant's Motion to Quash Indictment, (2) Defendant's Motion to Quash Jury Panel, and (3) Defendant's Motion to Quash the Talesmen after Special Venire was Exhausted, I have prepared and enclose same herewith. In view of the fact that some of the proceedings were had in connection with hearing on defendant's motions on October 4, 1951, and still other proceedings were had in connection with the trial of the cause on the merits beginning October 8, 1951, after announcement of ready, I have prepared two statements of fact.

I enclose herewith my bill for services in the sum of $51.

Thanking you and with kind regards, I am,

Very truly yours, (S.) O. G. Kehrer, Court Reporter, 2207 North De Leon Street, Victoria, Texas.

(File endorsement omitted.)

[fols. 35-37] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 38] IN DISTRICT COURT OF JACKSON COUNTY

[Title omitted]

TRANSCRIPT OF HEARING ON MOTION TO QUASH JURY PANEL AND MOTION TO QUASH THE INDICTMENT—October 4, 1951

APPEARANCES:

Mr. Wayne L. Hartman, District Attorney in and for the 24th Judicial District of Texas, Cuero, Texas;
Mr. Cullen B. Vance, County Attorney, Jackson County, Edna, Texas;
Mr. Wm. H. Hamblen, Special Prosecutor, Edna, Texas;
Appearing for The State of Texas;
Mr. Gus C. Garcia, 432 International Building, San Antonio, Texas;
Appearing for the Defendant.

[fol. 39] Whereupon, in said cause the following proceedings were had, to-wit:

Court: Which motion are you presenting first?
Mr. Garcia: I am offering the Motion to Quash the Jury Panel and the Motion to Quash the Indictment.

DEFENDANT'S TESTIMONY IN CHIEF

MRS. GENA LEE LAWRENCE, called as a witness on behalf of the defendant, having been first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Garcia:

Q. What is your name?
A. Gena Lee Lawrence.
Q. What official position do you hold in Jackson County?
A. District Clerk.
Q. How long have you held that official position?
A. Fifteen years.
Q. As part of your official duty do you have the responsibility of taking care of the lists of jury commissioners and grand jurors and petit jurors?

A. I take care of the lists that the jury commissioners [fol. 40] sel-ct *select* of grand jurors and petit jurors.

Q. In the course of your official duties do you get to see the names of the jury commissioners as they are appointed from time to time?

A. If the Judge gives me the authority to open the lists.

Q. And also the names of the grand jurors and petit jurors?

A. Yes, sir.

Q. During the time you have served in that official capacity have you known of a person of so-called Mexican or Latin American descent to be appointed a member of a jury commission in this County?

A. I don't think so; I don't recall that there ever was.

Q. Have you ever heard of a person of Latin American or Mexican descent being appointed as a member of a grand jury in this County?

A. I don't recall having heard of it.

Q. Have you ever seen or heard of a person of Mexican or Latin American descent being drawn on a venire for a petit jury?

A. I don't think so.

Q. I am going to ask you if you would be kind enough to make an investigation of your records and in the event you find there have been some that you did not recall, will it be——

Mr. Garcia: What I want to establish is the fact that the statement I just made is not contradicted. I want her to look over the records of her office to see if in reality there [fol. 41] ever has been in the last twenty-five years a person of Mexican or Latin American descent on a jury commission or grand jury or petit jury in this County.

Mr. Hartman: So far as the State is concerned it has no objection to Mrs. Lawrence doing that and no objection to counsel for the defendant introducing from the witness stand any testimony he might have after having done so, but we don't want it arbitrarily inserted in the record without an opportunity of cross-examination.

Court: No, sir. (Addressing the witness) Do you have the records available?

Witness: I can look in the minutes.

Court: Look and see what you can find.
Witness: I can look on the minutes.
Court: Mrs. Lawrence will look at the records she has.

Q. Are you a native of this County?
A. Yes, sir.

Q. I will ask you whether it is not a fact that in this County the people of the so-called Mexican or Latin American descent are looked upon as actually of a different race?
A. I don't think so.

Q. Isn't the expression "Mexican" and "white person" rather common in this community?
A. What was the question?

Q. Are not people of Mexican descent commonly referred [fol. 42] to as "Mexicans" or "Latin Americans" and people of other national origins referred to as "white people"?
A. I think we all understand that the Latin Americans are considered as white people.

Q. Isn't it a common expression in this community, the expression "Mexican" or "Latin American" in contrast with that of "white person" or "White man" or "white woman"?
A. I don't know but what it is—"Latin Americans".

A. Are you familiar with the service rendered to people of Mexican descent by public establishments in this community? Do you know anything about whether some business places do not serve people of Mexican origin?
A. No, sir.

Q. Do you know what the approximate percentage of the population of Jackson County consists of Mexican or Latin American origin?
A. No, sir.

Q. I will ask you whether or not it is a fact that persons of Mexican or Latin American origin appear on the tax rolls who would be eligible for jury commissioners or grand jury or petit jury service?

Mr. Hartman: Object to that because he has not established that she is qualified to know what the qualifications are for service on the grand jury and on the petit jury, and

until we know she is qualified in this respect we do not believe she is qualified?

[fol. 43] Court: If she knows, she can answer.

Q. Do you know what the qualifications are for service on a jury commission and grand jury and petit jury?

A. Yes, sir.

Q. You do know?

A. Yes, sir.

Q. Based upon that knowledge, I will repeat my question, and that is: Isn't it a fact that there are persons of Latin American or Mexican descent in Jackson County who are eligible for service on jury commissions and grand juries and petit juries?

A. I think I would have to say the Tax Collector would know that—whether they have paid their poll taxes.

Q. You don't know of your own knowledge whether any people of Mexican or Latin American descent have paid their poll taxes?

A. I don't know of my own knowledge. I could not tell you who had paid.

Q. You don't know of a single instance?

A. No, sir; I could not give you a single name just offhand.

Q. If you know, isn't it a fact that, generally speaking, people of Mexican descent are of rather low economic status in this County?

A. I guess, generally speaking, it is true.

Mr. Garcia: That is all.

[fol. 44] Cross examination.

By Mr. Hartman:

Q. Mrs. Lawrence, you stated while ago that during your service as District Clerk of Jackson County you did not know of your own knowledge of any person of Mexican or Latin American descent having served as jury commissioner?

A. Yes, sir.

Q. It is or not possible——Are you undertaking to say that they have not?

A. No, sir. I don't know.

Q. Isn't it possible that some one of them may have served without your knowledge?

Mr. Garcia: I don't think that question is phrased properly.

The Court: Objection overruled.

Q. Is it or not possible?

A. Yes, sir, it is possible.

Q. Now, when you undertake to say in your knowledge no person of Latin American or Mexican descent has served on a jury commission, do you base that on name alone or do you undertake to say no one of Latin American or Mexican blood has served on a jury commission during the ten years so far as you know?

A. I take it by names. I don't know; some of them might have been Latin American.

[fol. 45] Q. It is highly possible some or many of them might have had Latin American blood to a certain degree and not have had a Latin American name, is that right?

A. Yes, sir.

Q. Now, I will ask you whether or not the same is true in regard to service on grand juries?

A. Yes, sir.

Q. It is possible that Mexicans or Latin Americans may have served on grand juries without your knowledge?

A. Yes, sir.

Q. And it is possible that people with Latin American or Mexican blood with an English or Polish or some other national name might have served on grand juries?

A. Yes, sir.

Q. And I will ask you whether or not the same is true in regard to jury panels generally?

A. Yes, sir.

Q. Now, you stated while ago that people of Mexican or Latin American descent were often referred to as "Mexicans" in Jackson County?

A. I said usually "Latin Americans".

Q. Ma'am?

A. I think usually as "Latin Americans".

Q. They refer to them as "Latin Americans--?

A. Yes, sir, and sometimes they are referred to as "Mexicans".

[fol. 46] Q. Isn't it also true sometimes Bohemians are referred to as "Bohemians"?

A. Yes, sir.

Q. And Polish people as "Polanders"?

A. Yes, sir.

Q. And Germans as "Germans"?

A. Yes, sir.

Q. And on down the line?

A. Yes, sir.

Q. Have you or not during the time that you have served as District Clerk at any time seen any evidence of discrimination against the Mexican or Latin American nationality or Mexican or Latin American people in any of your official functions in the courthouse?

A. No, sir.

Mr. Garcia: Object to that as calling for a conclusion.

Court: Objection overruled.

A. I have not.

Q. Have you ever heard the Court say anything in your presence which would indicate that he had discriminated in any way against the Mexican or Latin American people?

A. No, sir, I have not.

Q. Now, Mrs. Lawrence, you stated while ago you lived in Jackson County?

A. Yes, sir.

[fol. 47] Q. And you are a native of Jackson County?

A. Yes, sir.

Q. Isn't it a fact that the children of Mexican or Latin American descent had the same schools as those of all other nationalities?

A. Yes, sir.

Q. And isn't it a fact that the Mexican and Latin American children play on the football teams we have?

A. It is a fact.

Q. And that the Mexican and Latin American parents belong to the Parent-Teacher Association?

A. Yes, sir.

Q. And the Mexicans or Latin Americans attend our theatres here in Jackson County?

A. Yes, sir.

Q. Have you as District Clerk in any of your official duties ever discriminated in any way against a Mexican or Latin American person or nationality?

A. I have not.

Re-direct examination.

By Mr. Garcia:

Q. You say that on occasions you have heard Polish people referred to as "Poles" and Germans as "Germans", is that right?

A. I have.

Q. But in all those instances people of Polish or German [fol. 48] descent were never referred to as anything but "white", and so on?

A. They were speaking of them as a different nationality.

Q. But never heard a person of Bohemian descent referred to as anything but "white", while you have heard people of Mexican descent called "Mexicans", the distinction made between "whites" and "Bohemians" that you say is made on occasions between "Mexican" and "white"?

Court: Will you break that down?

Mr. Garcia: I withdraw the question.

Q. Have you ever heard anyone referred to as a German and a white man?

A. No, sir, I don't think so.

Q. Have you ever heard anyone say "Bohemian" and "white man"?

A. No, sir.

Q. But you have heard people say "Mexican" and "white man" in contrast?

A. Yes, sir, I have heard that.

Q. And when you were questioned by the District Attorney you stated it was possible that people of Mexican or Latin American descent with an Anglo name might have served on juries?

A. Yes, sir.

Q. Can you give me the name of a single person in Jackson County who is considered of Mexican or Latin American descent who has an Anglo name?

A. What is the question?

[fol. 49] Q. That is considered a Mexican but who bears an Anglo American name?

Mr. Hartman: Object to that because she is not qualified to say who is considered a Mexican.

Q. Can you give me a single person who is a resident citizen of Jackson County who is of Mexican or Latin American blood but who bears an Anglo American name?

A. I don't recall any.

Q. Do you recall any Spanish named person ever appearing on the petit juries or grand juries or jury commission rolls of this County?

A. I don't recall any.

Q. With reference to school attendance, do you know how long the children of Mexican parents and the children of American parents have been going together here to school?

A. No, sir; but it has been several years.

Q. You would not say it was since the year 1948?

A. I would not say what year.

Q. And in answer to the District Attorney's question you stated that to your knowledge parents of Mexican children are members of Parent-Teacher Associations along with parents of Anglo American children?

A. Yes, sir.

Q. Is that true of service clubs like the Lions, Kiwanis and Optimists, or anything like that?

A. I could not tell you.

[fol. 50] Q. Do you know of any person of Mexican ancestry belonging to the Chamber of Commerce in this community?

A. I can say that I think there are members, but I could not tell their names.

STIPULATION

Mr. Hartman: The State will stipulate that for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County.

Court: That stipulation was made by both parties in open court and is approved by the Court.

CLAUDIUS BRANCH, called as a witness on behalf of the defendant, having been first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Garcia:

Q. Will you please state your name?
A. Claudius Branch.
Q. What official position do you hold in Jackson County?
A. County Tax Assessor and Collector.
Q. In the discharge of your duties in that position do you have charge of the assessment of property and tax rendition rolls of this County?
[fol. 51] A. Yes, sir.
Q. That includes the poll tax rolls?
A. Yes, sir.
Q. Are you a native of this County?
A. Yes, sir.
Q. Do you know the population of Jackson County?
A. I hate to say off-hand. It has changed in the last two or three years—something like 18,000.
Q. Approximately 18,000?
A. Yes, sir.
Q. Will you tell us approximately what percentage of that population consists of people of Mexican or Latin American descent?
A. That is an awful hard question. Roughly, I would say something——

Mr. Hartman: We don't want any rough estimate. We would like to have the facts.

Court: He is just estimating it.

A. (continued) I judge around 15 per cent.

Q. Now, do you have Spanish named persons on your property tax rolls in this County?

A. Yes, sir.

Q. Do you have Spanish named persons on your poll tax rolls?

A. Yes, sir.

Q. Do you have Spanish named persons, who are either natives or naturalized citizens of the United States, who [fol. 52] own property *property* and pay their poll taxes in this County?

A. Yes, sir.

Q. You would not be able to give us any idea how many?

A. No. I would have to check the tax rolls. The question has never come up before.

Q. You are familiar with the legal prerequisites for service as a member of a jury commission and grand jury and petit jury?

A. Yes, sir.

Q. Based upon that knowledge and the information in your office, would it be your testimony that there are persons with Spanish names who are eligible for service on a jury commission, grand jury and petit jury in this County?

A. I presume so.

Q. How is a special venire formed in this County? How is it drawn? I am not trying to trick you. I don't know.

A. A jury commission is appointed and that jury commission goes over the tax rolls. After they go over the tax rolls then they go to the certified poll tax list furnished by my office showing that these tax payers are eligible for voting, and the list is taken from the lists that they are furnished.

Q. How long did you say you served in that capacity?

A. I took over January 1, 1946.

Q. During the time you have been in office have you ever known of a grand jury commission selecting a Spanish named person to serve on the venire?

A. I have not had any reason to check it.

[fol. 53] Q. You are, of course, in charge of the poll tax rolls and tax rolls for 1951?

A. Yes, sir.

Q. And there are Spanish named persons on both rolls?

A. Yes, sir.

Q. Based upon your knowledge of the requirements and prerequisites for service on grand juries, jury commissions and petit juries, and from the information that you have in your office affecting tax rolls and poll tax rolls, would you say there are persons with Spanish names who are eligible for service here as jury commissioners or grand jurors or petit jurors in the year 1951?

A. Yes, sir.

Cross examination.

By Mr. Hartman:

Q. You don't normally keep track in your office yourself of the grand jury list and jury commission lists and petit jury lists?

A. No, sir.

Q. You are not qualified to say whether they have served or not?

A. No, sir.

Q. Now, you stated while ago in your opinion there were approximately 15 per cent Mexicans or Latin Americans in Jackson County?

A. That is a wild guess.

[fol. 54] Q. Can you or not state whether 15 per cent of the taxpayers are Mexicans or 10 per cent Bohemians? Does that same rule apply to others?

A. No, sir.

Q. You are not prepared to say how many freeholders of Mexican or Latin American descent were on your tax rolls?

A. No, sir, but, a rough estimate, I would say something like probably 6 or 7 per cent.

Q. You are not prepared to say how many householders are of Mexican or Latin American descent?

A. No, sir. I would not think——

Q. And you are not undertaking to say how many of

the people of Mexican or Latin American descent in Jackson County can read and write the English language?

A. No, sir, I could not.

Q. And you are not undertaking to say how many are women?

A. No, sir.

Q. From your experience in the Tax Collector's Office since 1946 have you at any time seen anybody in any way discriminate against a Mexican or Latin American because of his nationality?

A. No, sir. We carry them on the tax rolls as whites, I mean on the poll tax rolls.

Q. And they are looked upon in your office as "whites", just the same as a German or Pole or Bohemian?

A. Yes, sir.

[fol. 55] Re-direct examination.

By Mr. Garcia:

Q. Have they always been carried in your office as "whites"?

A. To the best of my knowledge, yes, sir.

Q. Of course, you are not in position to say whether other people in this County look upon them as "whites"?

A. No, sir.

Re-cross examination.

By Mr. Hartman:

Q. They have been carried on your rolls as "white" ever since you have been in office?

A. Yes, sir.

Lewis Watson, called as a witness on behalf of the defendant, having been first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Garcia:

Q. What is your name?

A. Lewis Watson.

Q. Mr. Watson, you are the Sheriff of Jackson County?
A. Yes, sir.
Q. How long have you been serving in that capacity?
A. Approximately ten years.
[fol. 56] Q. Are you a native of Jackson County?
A. Yes, sir.
Q. Are you familiar, Mr. Watson, with the service or lack of service offered to people of so-called Mexican or Latin American descent in this community in public places?
A. Yes, sir.
Q. Do all restaurants in this community serve people of Mexican of Latin American descent?
A. We have one here in town that does not.
Q. Can you tell us where that is located?
A. In the east end of town—Mr. Winn's cafe.
Q. Is that the one that has a sign on the outside?
A. Yes, sir.
Q. When was that sign "No Mexicans Served" removed?
A. I don't know when it was removed. I just saw it up there a couple or three weeks ago, or a month ago, but I see it is not there now.
Q. Have you endeavored in your position as Sheriff to practically improve relations between Latin Americans and Americans?

Mr. Hartman: That is irrelevant and immaterial.
Court: Sustain the objection.
Mr. Garcia: I withdraw the question.

Q. Do you know of any other places at the present time or in the last few years that have refused to serve people because of their Mexican or Latin American descent?
[fol. 57] Q. You don't know about the other restaurants on Main Street, right across from the courthouse square?
A. No, sir. They feed them I understand—both of them.
Q. When I asked that question, I mean assuming that the person is otherwise acceptable to the person, that he is not disorderly and not unclean. I mean solely on the basis of ancestry. On that basis, do you know of any other places that have refused to serve them in years past?
A. No, sir.

Q. The words "white man" or "white men" as distinguished from "Mexican" or "Latin American" are used rather commonly in this County?

A. I have heard it, yes, sir.

Q. With no particular disparagement, it is just a usage, custom and practice?

A. Yes, sir.

Q. As members of a group or a class, isn't it true that actually in this County you have three groups or classes: Anglo American, or "whites", also the people called Mexicans or Latin Americans, and the third class Negroes, isn't that true, in most affairs of the County?

A. Well, the Latin Americans are white and the Negro is a Negro.

Cross examination.

By Mr. Hartman:

Q. Mr. Watson, you stated while ago that there is one [fol. 58] cafe in Edna which had a sign for a time on it. What did that sign say?

A. "No Mexicans Served" I believe is the way it was.

Q. There was never any trouble over that?

A. No, sir.

Q. You state that the sign is not there now?

A. I don't think it is. Unless they put it back. I noticed it was moved.

Q. Neither you or anyone that you know of told him to take that sign down recently?

A. No, sir.

Q. And that is the only place you know of that did not at that time serve them?

A. That is right.

Q. Do you know whether they serve them now or not?

A. I don't know, because I have not been in there. In fact, it has been three weeks since I have been in the place.

Q. Isn't it true, Mr. Watson, that the citizens of Jackson County are composed of a number of nationalities?

A. Yes, sir.

Q. There is a large Bohemian population in Jackson County?

A. Yes, sir.

Q. And there is probably a large English population?

A. Yes, sir.

Q. And there are some Mexicans or Latin Americans?

[fol. 59] A. Yes, sir.

Q. Now, has it not been your experience that in social affairs the various nationalities more or less are inclined to stick together when they associate with one another?

A. Yes, sir.

Q. Is it LaWard that has quite a large Bohemian population?

A. Ganado and LaSalle.

Q. And they are more or less inclined to stick together?

A. Yes, sir.

Q. They are not excluded from anything anywhere?

A. No, sir.

Q. And isn't the same thing true of Mexican people?

A. Yes, sir.

Q. Isn't it true that most of them, or at least a large portion of them, speak Mexican or Spanish as their day-to-day tongue?

A. They do.

Q. And has it not been your experience that they are more or less inclined to stick together because of language?

A. Yes, sir.

Q. The same way with the Bohemians?

A. Yes, sir.

Q. And the same way with some of the Germans?

A. Yes, sir.

Q. You have a son here playing on the Edna High School football team?

[fol. 60] A. He played the last four years.

Q. Are there members of the Mexican or Latin American nationality on this football team?

A. Yes, sir.

Q. Playing with him?

A. Yes, sir.

Q. Side by side?

A. Yes, sir.

Q. On the first string?

A. Yes, sir.

Q. Now, then, have you or any member of your Department ever in any way discriminated against a person of Mexican or Latin American nationality simply because of that nationality?

A. We have not, no, sir.

Q. Isn't it a fact that in the Jackson County jail, when you had prisoners in there, you make no distinction between Latin Americans and any other nationality when it comes time to put them in jail?

A. No, sir. I put Latin Americans, Whites, Bohemians, Germans all on one side, and the Negroes on the other side.

Q. Have you during your term as Sheriff here ever heard of the Court or any other court officer do or say anything that would indicate to you that he was discriminating against the Mexican or Latin American nationality because of their ancestry or nationality?

[fol. 61] Mr. Garcia: I think that is asking for a conclusion.

Court: Sustain the objection.

Re-direct examination.

By Mr. Garcia:

Q. Have you ever seen a sign "No Bohemians Allowed" or "No Bohemians Served"?

A. No, sir, I have not.

Q. Have you ever seen a sign "No Germans Served" or "No Germans Allowed"?

A. No, sir.

Q. Have you ever seen a sign "No Englishman served" or "No Englishman Allowed"?

A. No, sir.

Q. But you have seen a sign "No Mexicans Served"?

A. At one place.

Q. And that sign was on the outside?

A. Yes, sir.

Q. In large letters?

A. Yes, sir.

Q. You have heard people referred to as "Bohemians" or as "English"?

A. Yes, sir.

Q. But you have never heard anyone say "This is a Bohemian" and "This is a white man"?

A. Yes, sir, I have heard them say that; I sure have.

Q. But it was not a Bohemian saying that?

[fol. 62] A. Yes, sir, I have heard Bohemians say that.

Q. You have heard Bohemians say that?

A. I have heard Bohemians call one another "Bohemian".

Q. The question I was asking was this: Whether you heard the words "white man" used as distinguished from "Bohemian"?

A. Yes, sir, I have heard them talking and say, "I am white and you are a Bohemian." I have heard Bohemians say, "I am a Bohemian and you are white".

Q. You have never heard anyone use that in seriousness, more or less in jest?

A. Yes, sir, I guess so.

Re-cross examination.

By Mr. Hartman:

Q. Isn't it a fact from your experience with people generally as Sheriff and as an official in the County that it is customary when a particular nationality sticks to its native tongue and carries on most of its conversations in its native tongue that they are then referred to by nationality much more so than when they all speak the English language?

Mr. Garcia: That is predicated upon a hypothesis that has not been established?

Court: Objection overruled.

A. Yes, sir, I have heard that, and seen it.

Q. When a German speaks German as his customary tongue, he is more readily referred to as a "German" than [fol. 63] a German who speaks English regularly?

A. Yes, sir.

Q. And the same is true with the other nationalities?

A. Yes, sir.

Q. And the same is true when they stick to their native Spanish?

A. Yes, sir.

Q. As Sheriff of Jackson County you have sat with many grand juries?

A. Yes, sir.

Q. Isn't it a fact that based upon your experience with those grand juries that every grand jury you have met with has given the same attention when the case under consideration involved people of Mexican or Latin American nationality as they have people of any other nationality?

Mr. Garcia: Objection to that because it calls for a conclusion.

Court: Objection overruled.

Mr. Garcia: Note our exception.

A. Yes, sir, they did.

Q. And has not it been your experience that the courts here in Jackson County—District Court, County Court, Justice Court—have given the same consideration?

A. Yes, sir.

Mr. Garcia: Same objection.

Court: Same ruling.

Mr. Garcia: Note our exception.

[fol. 64] Q. As they have of other nationalities?

A. Yes, sir.

Q. And the same has been true with you and the employees in your Department?

A. Yes, sir.

Oscar Bounds, called as a witness on behalf of the defendant, having been first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Garcia:

Q. What is your name?

A. Oscar Bounds.

Q. What is your position with the School District.

A. I am Superintendent of Schools.

Q. Is that Superintendent of the Edna Independent School District?

A. Yes, sir.

Q. How long have you held that position?

A. A year in August.

Q. Are you familiar with the policy or policies of the Edna Independent School District or System prior to your becoming Superintendent?

A. I was employed here prior to that.

Q. Mr. Bounds, can you tell us what year it was that *that* [fol. 65] the separate school for children of Mexican parents was abandoned by the Edna District?

A. No, sir;-I did not have anything to do with that.

Q. You don't know what year?

A. I know it was approximately three or four years ago.

Q. Would you say it was before or after the Federal Court decision prohibiting the segregation?

A. I would not say.

Q. At any rate until it was abandoned it was another school?

A. I don't think 100 per cent for children of Mexican descent, no, sir.

Q. What we are asking, that was about——

A. It was Latin American, but it was not 100 per cent for Latin Americans.

Q. Why was it called the Mexican school?

A. Because it was chiefly for Latin American children that had language difficulties. If a child was able to speak the English language they were not required to go to the Mexican school. Some children left before finishing the 4th grade.

Q. How many years were they taught in this school?

A. Four.

Q. Were children given language tests before they were sent to this school?

A. I am not sure.

Q. You say that some children left that school before fin- [fol. 66] ishing the 4th grade?

A. Yes, sir.

Q. About how many children a year?

A. I don't know.

Q. Would you say it would be a few or many?

A. I would say it would be few.

Q. After they taught them a year, would you say that there were few or many that left in the same year?

A. I don't know. I would not say.

Q. Where would you draw the line of demarcation? Why was it four years?

A. On the basis that if the teacher felt the child was ready and had become familiar with the English language then they were permitted to go.

Q. Were there Latin American children who were permitted to go to the other school from the very beginning?

A. I don't know about that either.

Q. You don't recall of any instance?

A. I am not positive. I believe it was after the teacher had them a while.

Q. And this school was maintained in a separate building from the other school?

A. That is right.

Q. Where the other children attended?

A. Yes, sir.

[fol. 67] Q. The Latin American school was separate and apart?

A. Yes, sir.

Q. Was it on the same campus?

A. No, sir; different location.

Q. That school is no longer maintained?

A. That is right.

Q. It was abandoned altogether?

A. Yes, sir.

Q. The building is no longer used?

A. It is being used for "Farmers' Ag" for the White High School.

Q. When it was abandoned and the children were permitted to go to the other school, what other school was it?

A. We had Sam Houston and Austin Elementary.

Q. When you abandoned the use of the Latin American school, I will not say "use", but permitted the children to go either to the Sam Houston or Austin Elementary School regardless nationality origin?

A. That is right.

Q. And regardless of whether they had any language handicap?

A. Yes, sir.

Q. You decided your theory had been wrong about language handicap?

A. I did not make that decision.

Q. That was made prior to your becoming Superintendent?

A. Yes, sir.

Q. Mr. Bounds, does the Edna Independent School Dis-
[fol. 68] trict take care of outlying sections?

A. Yes, sir.

Q. It covers more than the City of Edna?

A. Yes, sir.

Q. Can you tell us in approximate figures what the scholastic population of this County?

A. The County or the District?

Q. The District?

A. Around 1555.

Q. Can you tell us in approximate figures what percentage of this scholastic population consists of children of Mexican or Latin American descent?

A. I could not.

Q. You would not be able to give us any idea at all?

A. No, sir.

Q. Perhaps I phrased it wrong. Say, of Spanish named children?

A. I still would not be able to give it to you.

Q. Would you say that the bulk of the Latin American children that attend school are in the first 4 grades?

A. Yes, sir—I would say 5th or 6th grade.

Q. Generally speaking, that is about as high as they go?

A. The larger percent drop out around the 6th grade.

Q. Do you have any idea what the "casualties" would be?

A. No, sir.

Q. But the larger percent do drop out?

[fol. 69] A. I say a large per cent. I will not say the larger per cent.

Q. Do you know anyone that could give us the approxi-

mate figures of the scholastic population as to Latin American children?

A. I don't know of anyone that could give it to you.

Q. Of Spanish named children—on the basis of surnames?

A. No, sir. I don't know of anyone that could give you that.

Q. I presume you have all your school children listed on a roll?

A. We have a census roll you could check, but we don't break it down as to Latin American or Irish or French names, and so forth.

Q. Who in the System is in charge of keeping the rolls?

A. I have a copy of last year's roll. No one has a roll this year. It has not been sent out.

Q. Could you make that roll available for us?

A. Certainly.

Mr. Garcia: Your Honor, I would like to ask leave of the Court to get a copy of the roll and offer it in evidence for the purpose of showing the number of Spanish named children on the school census rolls of this District.

Court (Addressing the witness): You will furnish him copy of this roll by 1 or 1:15 o'clock?

Witness: Yes, sir.

Cross-examination.

Question by Mr. Hartman:

Q. You have been connected with the Edna Independent [fol. 70] School District for some time?

A. Since 1938.

Q. And you started with them as a teacher?

A. That is right—elementary school principal-teacher.

Q. And you have been with them ever since 1938?

A. Yes, sir.

Q. You have been Superintendent for how long?

A. One year.

Q. That was last year?

A. That was the last scholastic year and so far this year.

Q. Now, then, you were here then before the elementary school which you referred to -while ago was abandoned?

A. Yes, sir.

Q. The one in which students were placed who had language difficulties?

A. Yes, sir.

Q. Was it or not solely because of their language difficulties that they were placed in this other school here?

A. Yes, sir.

Q. Not because the School System and its teachers were discriminating against them because they were of Mexican or Latin American descent?

A. I don't think there was any discrimination. I don't know the basis back of the initial point. I don't know when it was started or how long it was in existence.

[fol. 71] Q. Do you know who started it?

A. No, sir.

Q. The purpose of the school, so far as you know, was to better teach children of Latin American descent who could not speak English?

A. That, to the best of my knowledge, was the purpose.

Q. Did you ever have any indication there was because any were being discriminated against and were not given the consideration they gave other children?

A. I never had any evidence of that.

Q. You stated that after the 5th or 6th grade some of these students of Latin American or Mexican descent dropped out of school?

A. Yes, sir.

Q. It is true that some other nationalities dropped out of school too along about that time?

A. Yes, sir.

Q. They did not all finish?

A. No, sir.

Q. And you don't undertake to say why they dropped out of school?

A. I don't really know the reason why.

Q. And I believe you stated -while ago when a child of Mexican or Latin American descent was placed in that elementary school it was kept there just so long as it was necessary for it to overcome the language difficulty?

[fol. 72] A. Yes, sir.

Q. And after that it was transferred to the other school?

A. At any time the teacher that was teaching the child felt — into the regular class it was brought over.

Q. Do you know of any instance where a child was placed in that school and after becoming ready to transfer was refused the right to transfer simply because of its nationality?

A. I do not.

Q. I believe you said that this elementary school has since been abandoned and is now used as an Agricultural School by the white High School. How many High Schools do you have in the District?

A. Two.

Q. The White and the Negro?

A. Yes, sir.

Q. And this Vocational School is for the "White" High school and not for the Negro High School?

A. Yes, sir.

Q. You have quite a few students of Latin American descent that go all through and finish High School, don't you?

A. I could not say how many.

Q. You have some?

A. Yes, sir.

Q. It is not unusual for one of them to finish?

A. I would not say about that.

[fol. 73] Q. Do you or not when they get into the regular school discriminate against them in any way in the school just because of their nationality?

A. Certainly not.

Q. They attend the same classes and sit in the same seats and use the same restrooms and play on the football team—there is no discrimination at all?

A. No, sir.

Re-direct examination.

Question by Mr. Garcia:

Q. You testified a moment ago that the reason for the maintenance of that Latin American elementary school was strictly one of language handicap or difficulty?

A. Did what?

Q. You testified a moment ago that the only reason that the Latin American school was maintained was because of the language handicap?

A. Yes, sir.

Q. I believe you testified in answer to my question you did not know why it was maintained or when it was started?

A. I told you I did not know why it was started. The only thing I told you is that when the child proved he had gotten to know the English language he was permitted to enter that group and use the English language.

Q. Who set up the standard for that?

[fol. 74] A. I don't know.

Q. Was it left entirely to the discretion of the particular teacher?

A. To the best of my knowledge the teacher recommended that that child go into another group and was permitted to do so.

Q. In answer to a question put to you by the District Attorney about that you stated you did not know of any instance where a child was refused admittance to the other school if he proved himself eligible from a language standpoint?

A. Yes, sir.

Q. Do you know of any specific instance where such a change took place before the child finished the 4th grade in the Latin American school?

A. Yes, sir.

Q. How many cases do you know.

A. I know of one specific one.

Q. And you have been with the School System since 1938?

A. Yes, sir. I said I know one definitely. I would have to check back and see. I am very familiar with the child.

Q. Would you say that such an event was unusual for a child to get transferred to the other school?

A. I would say it was a small percentage.

Q. Now, if that school was maintained in order to overcome the child's language handicap, I assume you had special techniques or methods that were used that you did not [fol. 75] have in the other school?

A. I don't know anything about the technique. I did not have supervision of that.

Q. Do you know of anything in that school that was different from the other school?

A. I do know they concentrated more on the use of English speaking and devoted more time to developing that phase than they did in the other school.

Q. I presume the building where these children were housed—and I am speaking of the Latin American school—was the same as Sam Houston and Austin buildings?

A. No.

Q. What was the difference?

A. These were stone structure and this other was frame structure.

Q. And I presume that substantially the same facilities were provided in the Latin American school as in the other?

A. To the best of my knowledge, yes, sir.

Q. How many rooms did the Latin American school have?

A. Two I believe.

Q. Two rooms and four grades?

A. Yes, sir.

Q. And two teachers?

A. Yes, sir.

Q. Each teacher taught two classes I presume?

A. I am not positive, but I imagine.

[fol. 76] Q. And to your knowledge it was the theory of the Edna Independent School District by having two teachers for four grades, each teaching two grades, that would be the best way to overcome the language handicap?

A. That was the theory back of it.

Q. Do you have two grades to a teacher in either Austin or Sam Houston School?

A. Yes, sir.

Q. Which one?

A. Sam Houston School.

Q. How many cases like that?

A. I don't know, but I do know there were some.

Q. But most of the time in the other school you had one teacher to a grade?

A. All departmentalized.

Q. Do you have any idea what the teachers' load was in the Latin American school?

A. No, I don't know.

Q. Have you any idea what the average teacher's load was in the other schools?

A. No, sir.

Q. Do you know how long that frame building had been standing there that was used for a Latin American school? When was it built?

A. I don't know, but it was a relatively new building.

Mr. Hartman: I don't see the relevancy of these questions.

[fol. 77] Mr. Garcia: I was trying to clarify some point.

Court: Go ahead.

Q. Do you have any children whose native tongue is Bohemian attending your System?

A. I would imagine, but I never hear any of them speaking Bohemian.

Q. To your knowledge has a separate school been maintained to overcome language handicap for any other nationality than Latin American in the Edna Independent School District?

A. Not to my knowledge.

Q. How many High School graduates did you have last year?

A. 63.

Q. How many of those were Latin American?

A. I don't know.

Q. Were there some?

A. Yes, I am positive there were some.

Q. But you do not know how many?

A. No, sir.

Q. When you get the census rolls, will you be kind enough to provide for me the list of names of the graduates?

A. I think I can.

Re-cross examination.

Questions by Mr. Hartman:

Now, Mr. Bounds, Mr. Garcia asked you -while ago who it was that recommended or decided when these children in

[fol. 78] the Latin American elementary school were ready to go to the other school, and you stated that the teacher did. Isn't it true that the development of any child in school and the rate of development is left more or less in the teacher's hands?

A. Yes, sir.

Q. And isn't it true she is the one that decides when a child is promoted from one grade to another?

A. Yes, sir.

Q. And you stated you do not know of any instance where a child was denied the right of advancing once it was ready?

A. Yes, sir.

Q. You stated yourself you knew of only one case where a child was advanced before finishing the four years?

A. I said I definitely know of one.

Q. You are not undertaking to say that is the only one?

A. No, sir.

Q. Is it your belief there were more?

A. I don't know.

Q. The object in this elementary school was to teach the child English along with the other subjects, but was not the emphasis on teaching English?

A. Yes, sir.

Q. Speaking, reading and writing the English language?

A. Yes, sir.

Q. And approximately how long does it take to teach a [fol. 79] child the English language?

Mr. Garcia: I want him qualified on that, and if he is an expert on it then I will take him on voir dire.

Mr. Hartman: I withdraw the question.

Q. Do you from your experience in public school work as a teacher, as Superintendent, do you or not know approximately how long it takes to teach the average Latin American student to speak the English language?

A. No, sir. That would vary and depend on how much assistance from home. Many things enter into that. I don't have any idea.

Q. Do you know whether there were any students who remained in this elementary school for 4 years and still had language difficulty?

A. I don't know about that.

Q. Isn't it a fact that many small schools, country schools, various country schools, only have one or two rooms in them?

A. Yes, sir.

Q. And isn't it a fact that one or two teachers take care of every grade in those schools?

A. That is right.

Q. And those students, if they pass their work, are qualified to go on to High School?

A. Yes, sir.

Q. From your experience in the schools which nationality [fol. 80] of children has the most language difficulty, the Bohemians, Germans, or Mexicans or Latin Americans?

A. The one I have by experience is Latin Americans.

Q. They have the most language difficulty?

A. Yes, sir.

Q. And you stated so far as you know you did not have any Bohemian students who could not speak English?

A. That is right.

Q. And do you or not know of any instance where a German child started elementary school without being able to speak English?

A. No, sir, I don't know of any.

Q. You no longer maintain the school for language difficulty?

A. No, sir.

Q. You stated to Mr. Garcia you don't know how many members of the Mexican or Latin American nationality were in your graduation class last year?

A. Yes, sir.

Q. Isn't it a fact that all Latin American students were given the same opportunities to graduate from school as those children of any other nationality?

A. That is right.

Re-direct examination.

Question by Mr. Garcia:

Q. From your experience as a teacher would you state that it is easier to teach a child a foreign language by segre-

[fol. 81] gating that child with other children who speak only that language at the age of 6 or 7 or that it would be easier to teach them by letting them mix freely with children who do speak that language all right?

A. I have never taught any language. I don't know.

Q. You are not vouching for the system or rather the policy pursued by the Edna Independent School District prior to the abandonment of the school?

A. As far as whether they learn English quicker when in contact with others who speak English constantly, I don't know.

Q. Do you have any idea what the solution for a 6-year old child is?

A. No, sir. That will vary with each child.

Q. Would you say for a teacher teaching two grades in one room, altogether in one room, would be conducive to the rapid learning of a foreign language by those children?

A. Certainly it is.

Q. You do that in all grades in Sam Houston or Austin?

A. No, sir, not all grades.

Q. For a teacher to have two grades in either Austin or Sam Houston was the exception rather than the rule?

A. I believe that is pretty well true.

Q. But it was the rule and not the exception in the Latin American school?

A. I believe that is true.

[fol. 82] STIPULATION

Mr. Garcia: It is stipulated by counsel for the State and counsel for the defendant that there are some male persons of Mexican or Latin American descent in Jackson County who, by virtue of being citizens, householders, or freeholders, and having all other legal prerequisites to jury service, are eligible to serve as members of a jury commission, grand jury and/or petit jury.

Mr. Garcia: I have nothing further, except getting the percentage of names on the rolls and the percentage of High School graduates.

STATE'S TESTIMONY IN CHIEF

L. S. HORTON, called as a witness on behalf of the State, having been first duly cautioned and sworn to testify the

truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

Questions by Mr. Hartman:

Q. You are L. S. Horton?
A. Yes, sir.

Q. Where do you live?
[fol. 83] A. Ganado.

Q. What business are you in?
A. I am supposed to be retired. I am working now for the Mauritz Rice Storage Company.

Q. You are a citizen of Jackson County?
A. Yes, sir.

Q. I will ask you to state whether or not you were recently appointed a jury commissioner for Jackson County?
A. Yes, sir.

Q. And by whom were you appointed?
A. I guess the District Judge. Mr. Watson notified me to come.

Q. And you were then appointed and sworn in by the District Judge, Howard P. Green?
A. Yes, sir.

Q. And you did serve in that capacity?
A. Yes, sir.

Q. Did you or not in company with other jury commissioners select the Grand Jury Panel for the present term of the District Court, 24th District, in Jackson County?
A. We did.

Q. I will ask you, Mr. Horton, whether or not in making your selections on this Grand Jury Panel you or any of the other Jury commissioners in your presence at any time discriminated against persons of Mexican or Latin American descent in forming that Grand Jury Panel?
[fol. 84] Mr. Garcia: The word "discrimination" called for a conclusion. I want to know what counsel is asking, what he means by "discrimination".

Mr. Hartman: Withdraw the question.

Q. How did you go about selecting the men to serve on the Grand Jury Panel?

A. The District Judge gave us each instructions as to what they would be; they had to have a poll tax receipt, and be a freeholder, and a householder in the County.

Q. Did you or not then select for service on this Panel the men in Jackson County who were qualified and whom you thought to be best qualified for that service?

A. Yes, sir.

Q. Did you in selecting the man to serve on that Grand Jury Panel in any way discriminate against any person otherwise eligible simply because of the fact that he was of Mexican or Latin American descent?

A. We did not.

Q. Did you purposely leave off of that panel any man who was otherwise qualified simply because he was of Mexican or Latin American descent?

A. No, sir.

Q. Did you receive any instructions from the Court which would have indicated to you it was his desire that you leave anyone off of the Grand Jury Panel simply because such [fol. 85] person was of Mexican or Latin American descent?

A. We did not.

Cross examination.

Questions by Mr. Garcia:

Q. You are a native of this County?

A. I have been here almost 33 years.

Q. You know, of course, there is a certain percentage of people of Mexican or Latin American descent that are residents of Jackson County?

A. Yes, sir.

Q. By the same token matters that come before the Grand Jury often they affect people of Mexican or Latin American descent?

A. As I said, we find all nationalities have misdemeanors or felonies and disobey the law.

Q. No particular racial or nationality group has a monopoly?

A. That is right.

Q. However, because of the fact that Spanish is the native tongue of these people wouldn't it occur to you that possibly having a person who speaks Spanish on the Grand Jury would be of benefit?

A. Well, to my knowledge, that was not discussed.

Q. You do know, of course, there are many people of Mexican or Latin American descent in this County who don't speak any English at all?

A. Yes, sir. In fact, I know quite a few myself that don't [fol. 86] understand English.

Q. There was a likelihood that non-English speaking people would come before the Grand Jury?

A. It is possible.

Q. But the matter was never discussed in selecting the members of the Grand Jury?

A. No, sir.

Q. It was not discussed either way?

A. No, sir.

Q. And it was your testimony you simply selected the people who were best qualified to serve on the Grand Jury?

A. Yes, sir.

Re-direct examination.

Questions by Mr. Hartman:

Q. While giving you instructions as jury commissioners, isn't it a fact that the District Judge told you a legal requirement for service on the Grand Jury is the ability to read and write the English language?

A. Yes, sir.

Re-cross examination.

Questions by Mr. Garcia:

Q. And you made no effort to ascertain whether or not a person or persons of Mexican descent were eligible to serve on the Grand Jury?

A. No, sir.

[fol. 87] Re-direct examination.

By Mr. Hartman:

Q. That matter was not discussed?

A. There was no racial discrimination discussed. We selected them irrespective of nationality. We did not turn this man down because he was a Bohemian, or this man because he was a Pole, or this one because he was a Negro, or this one because he was Spanish. We selected good, levelheaded men that are outstanding for good common sense for our Grand Jury.

Q. And the men that were on that panel were the ones you selected?

A. Yes, sir.

Re-cross examination.

By Mr. Garcia:

Q. In addition to selecting the Grand Jury here, did you have a Petit Jury Panel?

A. Yes, sir.

Q. How many people did you select for the Petit Juries?

A. As well as I recall we selected 250—for 5 weeks at 50 each.

Q. And with reference to that you followed the same procedure, in selecting the 250 Petit Jurors, that you did with reference to the Grand Jury?

A. Yes, sir. In other words, we did not want to have an ex-horse thief as a juror.

Q. And you made those efforts to determine whether [fol. 88] there were any ex-horse thieves?

A. We did not pay any attention to what nationality he was. We selected the man, not the nationality.

Q. And in carrying out that policy, you just did not have to select any people of Mexican descent on your jury panel?

A. That is right.

Q. And I believe you answered my question while ago you made no particular effort to determine whether there were any people of Mexican descent eligible to serve?

A. We had a roll and that was what we used. We never discussed it.

Re-direct examination.

By Mr. Hartman:

Q. And you did not leave any off simply because of his nationality?
A. No, sir.

Re-cross examination.

By Mr. Garcia:

Q. It just is not customary for people of Mexican descent to serve on Grand Juries?
A. I could not say about that.

Mrs. Shirley Schroeder, called as a witness on behalf of the State, having been first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

[fol. 89] Direct examination.

By Mr. Hartman:

Q. What is your name?
A. Mrs. Shirley Schroeder.
Q. You live in Edna?
A. Yes, sir.
Q. In Jackson County?
A. Yes, sir.
Q. How long have you lived here?
A. Six years in October.
Q. What is your business?
A. I am the Secretary of the Jackson County Chamber of Commerce.
Q. How long have you held that position?
A. We have just organized the Jackson County Chamber of Commerce on July 1st, of this year, and I assumed that

position at that time. This present Chamber of Commerce is the outgrowth of the Edna Chamber of Commerce and it is now a Countywide organization, and I had served with the previous organization.

Q. As Secretary?

A. Yes, sir.

Q. There is another thing: Has the Edna Chamber of Commerce merged into and become a part of the Jackson County Chamber of Commerce?

A. Yes, sir.

[fol. 90] Q. I will ask you to state whether or not you are familiar with the membership of the present Jackson County Chamber of Commerce?

A. Generally so, yes, sir.

Q. Are there or not members of your organization who are of Latin American or Mexican descent?

A. Well, I believe right now we only have one. We have several on our potential membership list that we are hoping will come in, but they have not sent in their memberships yet.

Q. Does that or not mean that you are soliciting their membership into your organization?

A. Yes, sir. I might explain: In the Edna Chamber of Commerce we had a list of members and we had several Latin Americans on the list and when we organized countywide we, naturally, solicited all of our old members for membership in the countywide organization.

Q. There is nothing in your charter or your by-laws which prohibits a person of Mexican or Latin American descent to belong?

A. Definitely not.

Q. As a matter of fact, they are welcome?

A. They are invited.

Q. Do you know whether or not any person of Mexican or Latin American descent has ever sat on the Board of Directors of the Edna Chamber of Commerce before merg-
[fol. 91] ing into the countywide organization?

A. Yes, sir. In the year 1949-1950 we had two Latin Americans on the Board of Directors, and 1950-1951 we had two Latin Americans on the Board of Directors.

Cross examination.

By Mr. Garcia:

Q. Do you recall approximately how many members you had in the old Edna Chamber of Commerce, before it merged with the County Chamber of Commerce?

A. I believe it was about 170.

Q. And about how many were Latin Americans?

A. I could not—I don't know exactly.

Q. Would you say fewer than 10 or more than 10?

A. I would say it would be fewer than 10.

Q. Would you say about 5?

A. Without checking my rolls I would not say, but I would say it was less than 10.

Q. And at present you say you have two on the rolls of the Jackson County Chamber of Commerce?

A. I believe that is right. We are just getting organized and our membership, I don't remember it exactly.

Q. As Secretary of the Chamber of Commerce I take it you have had occasion to observe the activities and functions of the service clubs, like Kiwanis Club, Lions Club, Rotary Club, and so on?

[fol. 92] A. In a general way, yes, sir.

Q. How many service clubs do you have here?

A. We have the Rotary and Lions and recently organized a Junior Chamber of Commerce, which I think is classified as a service club.

Q. Do you know of any Latin Americans who have ever been members of the Rotary or Lions?

A. I would not be in position to know.

Q. You don't know either way?

A. No, sir.

Q. How about the Junior Chamber of Commerce?

A. I would not know.

Q. Are you a native of Jackson County?

A. No, sir. I have lived here since 1945.

W. C. SIMONS, called as a witness on behalf of the State, having been first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Hartman:

Q. Your name is W. C. Simons?
A. Yes, sir.
Q. Where do you live?
A. Vanderbilt.
[fol. 93] Q. What business are you in?
A. Ranching.
Q. How long have you lived in Venderbilt?
A. I have been living there about 10 years.
Q. How long have you lived in Jackson County?
A. All my life.
Q. Mr. Simons, you were appointed by the District Court of Jackson County to serve as a Jury Commissioner for this term of court?
A. Yes, sir.
Q. Did you or not serve in that capacity?
A. Yes, sir.
Q. And you, along with the other members of the Commission, selected our Grand Jury Panel for this term of Court and the Petit Jury Panel?
A. Yes, sir.
Q. I will ask you whether or not, when you were sworn in as Jury Commissioner by the District Court—Who swore you in?
A. Judge Green.
Q. Judge Howard P. Green?
A. Yes, sir.
Q. Judge of the 24th Judicial District of Texas?
A. Yes, sir.
Q. Did he at that time say anything to that Jury Commission in regard to discriminating in any way against any person or persons of a nationality?
[fol. 94] A. None whatsoever.

Q. Did he or not say anything in his instructions to you in regard to discriminating against anyone of Mexican or Latin American descent in selection of the Grand Jury Panel or the Petit Jury Panel?

A. No, sir.

Q. There were five members on your Commission?

A. Yes, sir.

Q. And you all five concurred in the selection made, consulted on them and concurred in them?

A. Yes, sir.

Q. State whether or not you as a member or whether any of the other members of the Commission in your presence failed to place anyone on the Grand Jury Panel or Petit Jury Panel because of his nationality?

A. No, sir.

Q. Was any distinction made in anyway in any of those selections because of nationality?

A. No, sir.

Q. Was the matter of nationality even discussed?

A. No, sir; it was not discussed.

Q. And when you and the other members of the Jury Commission appointed the members of the Grand Jury Panel, did you or not follow the Court's instructions and select the men whom you thought were the best qualified for the job?

[fol. 95] A. That is what we tried to do.

Q. And did you do the same in regard to the Petit Jury Panel?

A. Yes, sir.

Q. Did you or not in any way at any time during your service on the Jury Commission discriminate against any such person where he was of Mexican or Latin American descent?

A. No, sir.

Mr. Hartman: That is all.

Mr. Garcia: No questions.

W. J. SMITH, called as a witness on behalf of the State, having been first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Hartman:

Q. You are Mr. W. J. Smith?
A. Yes, sir.
Q. Where do you live?
A. At Marbro.
Q. In Jackson County?
A. Yes, sir.
Q. What is your business?
A. In the oil field.
Q. How long have you lived in Jackson County?
[fol. 96] A. Eight years.
Q. You were appointed by the District Court of Jackson County to serve as Jury Commissioner for this term of court?
A. Yes, sir.
Q. You were sworn in as such and then served as such?
A. I did.
Q. Were you or not sworn in by Judge Howard P. Green, Judge of the 24th District Court of Jackson County, Texas?
A. I was.
Q. I will ask you to state whether or not at that time Judge Green, the Court, gave you any instructions in regard to discriminating in any way against any person because of his nationality in making your selections on that panel?
A. No, sir.
Q. He gave you no such instructions, is that right?
A. That is right.
Q. And he did not mention it?
A. No, sir.
Q. And when you served on the Jury Commission along with the other four members and when you made your selec-

tions for the Grand Jury Panel and the Petit Jury Panel, did you or any one of the other Commissioners at any time fail to place anybody on either of those Panels simply because of their nationality?

A. We did not.

Q. Did you fail to place anyone on there because he was [fol. 97] of Mexican or Latin American descent?

A. We did not.

Q. Was any type of discrimination discussed by you?

A. No, sir.

Q. And when those selections were made, did you appoint men whom you and the other Jury Commissioners thought best qualified?

A. To the best of our ability we did.

Mr. Hartman: That is all.

Mr. Garcia: No questions.

FLOYD LARKIN, called as a witness on behalf of the State, having been first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Hartman:

Q. You are Floyd Larkin?

A. Yes, sir.

Q. You live our at Coredele?

A. Yes, sir.

Q. What business are you in?

A. Farming.

Q. How long have you lived in Jackson County?

A. All my life—37 years.

Q. You were appointed by the District Court of Jackson [fol. 98] County as a Jury Commissioner for this term of court?

A. Yes, sir.

Q. And you were sworn in as such by Judge Howard P. Green, Judge of that Court?

A. Yes, sir.

Q. In his instructions to you, did the Court tell you anything to indicate to you he wanted you or the other Jury Commissioners to in any way discriminate against anybody by reason of their nationality?

A. No, sir.

Q. Did he tell you or anybody on the Commission to leave anybody off of the Grand Jury Panel or Petit Jury Panel because he was a Mexican or Latin American or because he was any other nationality?

A. No, sir.

Q. And when you and the other Jury Commissioners selected the Grand Jury Panel for this term and the Petit Jury Panel for this term, did you or any of the other Commissioners leave anybody off of those Panels by reason of their nationality?

A. No, sir.

Q. Did you leave anyone off because he was a Latin American or Mexican?

A. No, sir.

Q. Did you or not make appointments of men whom you and the other Jury Commissioners thought were best qualified for the job?

[fol. 99] A. Yes, sir, we did.

Mr. Hartman: That is all.

Mr. Garcia: No questions.

C. D. Winstead, called as a witness on behalf of the State, having been first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Hartman:

Q. What is your name?

A. C. D. Winstead.

Q. You live in Ganado?

A. Yes, sir.

Q. Jackson County?
A. Yes, sir.
Q. How long have you lived in Ganado, Jackson County?
A. About 10 years.
Q. How long have you lived in Jackson County?
A. About 10 years.
Q. What is your business?
A. I am Tax Collector for the School District.
Q. Are you or not familiar with the students who go to the Ganado Independent School District?
A. Yes, sir.
[fol. 100] Q. Are you familiar with the students who go to the Ganado School?
A. Yes, sir. I have taught there, taught vocation and I have coached football there.
Q. Please state whether or not during your experience with the Ganado School there have been students of Latin American descent who have played on the football team?
A. Yes, sir, there have been.
Q. And have been members of the chief squad?
A. Yes, sir.
Q. State whether or not in your experience any student of Latin American descent has ever been discriminated against simply because of nationality?
A. Not to my knowledge since I have been there.
Q. Now, are you a member of any service organization?
A. Yes, sir.
Q. Which one?
A. The Rotary.
Q. Do you hold any office?
A. I was President last year.
Q. I will ask you to state whether or not any of the members of the Rotary are of Latin American descent?
A. Yes, sir.
Q. How many?
A. I recall only one. There might be others.
[fol. 101] Q. Is he still a member?
A. He is not.
Q. Why not?
A. He left town.

Q. He is not a member of your Club, but so far as you know he is still a member of Rotary International?

A. I don't know. However, he was a member when he was there.

Q. And a member when he left?

A. Yes, sir.

Q. Was he a member in good standing?

A. Very good standing.

Q. Met with you regularly?

A. Yes, sir.

Q. And took part in your service organization?

A. Yes, sir.

Cross-examination.

By Mr. Garcia:

Q. Mr. Winstead, you testified you were Superintendent?

A. No, sir. Tax Collector.

Q. You are familiar with the operation of the Ganado Independent School District?

A. Yes, sir.

Q. How many schools does your District consist of?

A. Only one.

Q. Do you know the approximate enrollment in your school?

[fol. 102] A. Yes, sir.

Q. How many?

A. A little less than 800.

Q. As I understand then it is one building and the children go to school from the first grade through to the high school?

A. Yes, sir.

Q. Now, can you tell me approximately what percentage of those pupils are of Mexican or Latin American descent?

A. I don't know.

Q. Can you tell me what the approximate percentage of the residents of the Ganado Independent School District or patrons of that District are of Mexican or Latin American descent?

A. I don't know.

Q. You would not have any idea from your tax collections?

A. No, sir.

Q. Can you tell us approximately how many graduated last year?

A. I believe there were 30.

Q. Can you tell me how many of those were of Mexican or Latin American descent?

A. No, sir.

Q. Do you recall any of them being of Mexican or Latin American descent?

A. I do not.

Q. Do you have any affirmative recollection of any Latin American graduating from your High School?

A. Yes, sir.

[fol. 103] Q. But you don't recall that to have been last year?

A. No, sir.

Q. You have no affirmative recollection?

A. The only recollection I have is when I was connected with the school teaching and had boys playing on the football team. I knew when those boys graduated and I knew they were of Latin American descent.

Q. You knew what they were?

A. Yes, sir.

Q. As far as you know, there has never been more than one school building in that District?

A. Yes, sir; there have been several.

Q. In recent years?

A. Well, since 1946 there were more than two and as recently as 1948 there were more than two.

Q. Were any of those schools Latin American?

A. No, sir.

Q. There has never been any segregation in your System?

A. Not that I know of.

Q. And you were connected with the system how many years?

A. I lived in Ganado 10 years.

Q. I take it then all other buildings, schools, were consolidated in one building, school building?

A. Yes, sir.

Q. And as far as you know, there has never been any [fol. 104] separate school for persons of Mexican or Latin American descent?

A. Not that I know of. They all attended the same school.

Q. Regardless of whether or not they spoke English when they first came to school?

A. That is my recollection.

Re-direct examination.

By Mr. Hartman:

Q. Mr. Winstead, Ganado is in Jackson County?

A. Yes, sir.

Q. How far is it from Edna?

A. About 9 miles.

Lon R. Drushel, called as a witness on behalf of the State, having been first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Hartman:

Q. What is your name?

A. Lon R. Drushel.

Q. You live in Edna, Jackson County?

A. Yes, sir.

Q. What business are you in?

A. I am in the banking business.

Q. In the Jackson County State Bank?

A. Yes, sir.

[fol. 105] Q. Have you lived in Jackson County all your life?

A. Yes, sir.

Q. You were appointed by the District Court of this County as a Jury Commissioner to serve at this term of the District Court?

A. Yes, sir.

Q. And you were, accordingly, sworn in as a Jury Commissioner by Judge Howard P. Green, District Judge——

A. Yes, sir.

Q. ——24th Judicial District of Texas?

A. Yes, sir.

Q. I will ask you to state whether or not at the time that Judge Green swore you in or at any other time while he was informing or instructing the Jury Commissioners he made any statement to you or any of the other members of the Jury Commission which would indicate that he wanted you to discriminate against anybody in making your selections on the Grand Jury Panel and Petit Jury Panel?

A. No, sir, he did not.

Q. Was anything like that said by the Court at all?

A. Not that I can recall. I am sure there was not.

Q. And after you had been sworn in and you and the other members of the Jury Commission were making your selections for the Grand Jury Panel and Petit Jury Panel for this term did you or any other member leave anybody off of either of those lists simply because of their nationality?

[fol. 106] A. No, sir.

Q. Did you or any other member of the Jury Commission discriminate against the Mexican or Latin American nationality in any way in making those selections?

A. Not that I can think of.

Q. Did you or not when you made those selections select the men whom you thought best qualified?

A. That is what we did.

Q. Irrespective of nationality?

A. Yes, sir.

Cross examination.

By Mr. Garcia:

Q. It never occurred to you any person of Mexican or Latin American descent might be eligible for Grand Jury work, did it?

A. Well, I am sure there are. I understood they were eligible.

Q. How about your Petit Jury list? Did it occur to you there might be some who might be eligible?

A. I am sure we probably have some. It was quite a list. I don't recall just who was on it, but I am sure we probably have some. I don't know without looking them over.

Q. It just is not customary for Grand Jury Commissioners to appoint people of Mexican or Latin American descent on Grand Jury Panels and Petit Jury Panels?

A. I don't know about that. I think that we tried to pick [fol. 107] the men best qualified.

Re-direct examination.

By Mr. Hartman:

Q. As far as your knowledge?
A. I think possibly we did.
Q. And the Petit Jury list?
A. Yes, sir.

DEFENDANT'S REBUTTAL

JOHN J. HERRERA, called as a witness on behalf of the defendant, having been first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Garcia:

Q. What is your name?
A. John J. Herrera.
Q. Are you a member of the Texas Bar?
A. I am.
Q. Where do you practice?
A. I practice all over the State of Texas.
Q. Mr. Herrera, I will ask you whether you examined a list that I handed you with some 63 names that has been handed to me from the Edna Independent School District [fol. 108] showing the graduates for the term 1951 from

the Edna High School. I will ask you whether you examined that list?

A. I did.

Q. Is Spanish your native tongue?

A. Yes, sir.

Q. Did you learn it simultaneously with English or before you learned English?

A. Yes, sir.

Q. At home did you ordinarily speak Spanish?

A. Yes, sir.

Q. Will you say you are well versed with the Spanish language?

A. Yes, I would say so.

Q. Are you bilingual?

A. Yes; and I can read and write them too.

Q. Are you familiar with surnames that can be considered Spanish or Hispanic?

A. Yes, I am.

Q. Names like Garcia and Herrera, and so on?

A. Yes, sir.

Q. Did you find on that list of 63 graduates any Spanish names?

A. Yes, I did.

Q. How many?

A. Two.

Q. Do you recall what those names were?

A. One was Victor Rudriguez. I believe the last name [fol. 109] was more or less misspelled. The correct spelling would be R-o-d-r-i-g-u-e-z. I believe on the list the last name was that. And the other name was Chris Rosas.

Q. You found no other Spanish names?

A. No, sir.

Q. During the noon recess I will ask you if you had occasion to go back here to a public privy, right in the back of the courthouse square?

A. Yes, sir.

Q. The one designated for men?

A. Yes, sir.

Q. Now did you find one toilet there or more?

A. I found two.

Q. Did the one on the right have any lettering on it?

A. No, sir.

Q. Did the one on the left have any lettering on it?

A. Yes, it did.

Q. What did it have?

A. It had the lettering "Colored Men" and right under "Colored Men" it had two Spanish words.

Q. What were those words?

A. The first word was "Hombres".

Q. What does that mean?

A. That means "Men".

Q. And the second one?

[fol. 110] A. "Aqui", meaning "Here".

Q. Right under the words "Colored Men" was "Hombres Aqui" in Spanish, which means "Men Here"?

A. Yes, sir.

Cross examination.

By Mr. Hartman:

Q. What list was that you were talking about while ago?

A. The list I believe Mr. Winstead gave to Mr. Garcia and Mr. Garcia handed it to me.

Q. I am sorry. I did not understand.

Q. I think a gentleman by the name of Winstead handed it to Mr. Garcia and Mr. Garcia handed it to me.

Q. What was the list supposed to be?

A. Reported to me as being the list of the last senior graduation class of the High School in Jackson County.

Q. And you state there were two Spanish names on that list?

A. Yes, sir. I should say there were only two names that could be interpreted as being Hispanic or Mexican origin. There might have been more. Of course, sometimes they inter-marry.

Q. You are not undertaking to say that there were only two of those graduates of Latin American descent, but only two had Spanish names?

A. Yes, sir.

Q. And, of course, you are not undertaking to say there was any discrimination against any other Latin American

[fol. 111] pupils so that they could not have graduated?

A. No, sir.

Q. You are just down here on a visit?

A. Yes, sir.

Q. There was not a lock on this unmarked door to the privy?

A. No, sir.

Q. It was open to the public?

A. They were both open to the public, yes, sir.

Q. And didn't have on it "For Americans Only", or "For English Only", or "For Whites Only"?

A. No, sir.

Q. Did you undertake to use either one of these toilets while you were down here?

A. I did feel like it, but the feeling went away when I saw the sign.

Q. So you did not?

A. No, sir, I did not.

Q. But you are not telling the Court you could not have used the unmarked toilet simply because your name is Herrera?

A. No, sir.

Re-direct examination.

By Mr. Garcia:

Q. Neither can you tell the Court that you were invited to use the one on the right?

A. No, sir.

[fol. 112] Q. And the one on the left that had the lettering "Colored Men" and "Hombres Aqui" you did not see a sign "For Whites Only", or "For English Only", or "For Americans Only"?

A. No, sir.

Q. Only "Colored Men" and "Hombres Aqui"?

A. Yes, sir.

JAMES DE ANDA, called as a witness on behalf of the Defendant, having been first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Garcia:

Q. What is your name?
A. James De Anda.
Q. Mr. De Anda, what is your business or occupation?
A. I am an attorney.
Q. Where do you live?
A. In Houston, Harris County, Texas.
Q. Are you now engaged in active practice?
A. Yes, sir.
Q. Mr. De Anda, I will ask you to identify the documentary instrument you have in your hands.
A. This is a census roll for Jackson County, the School District.
Q. I handed you that instrument?
[fol. 113] A. Yes, sir.
Court: We will let the record show that is the one that Mr. Bounds delivered to Mr. Garcia.

Mr. Hartman: That is correct.

Q. What else does that say?
A. This is the white, apparently white children; it is dated 1950 to 1951.
Q. And the heading is "Consolidated Census Roll"?
A. Yes, sir.
Q. Mr. De Anda, will ask you whether or not you counted the number of names on that consolidated census roll?
A. I did, yes, sir.
Q. How many names did you find on that roll?
A. I found 1184 names.
Q. In all?
A. Yes, sir.
Q. Now, Mr. De Anda, are you familiar with Spanish or Hispanic names?

A. Yes, I am.

Q. You are familiar with the Spanish language?

A. Yes, sir. I speak Spanish.

Q. Do you also read and write Spanish?

A. To a limited extent.

Q. Do you recognize common Spanish and Hispanic names?

A. Yes, I do.

[fol. 114] Q. At my request did you peruse this list for the purpose of obtaining the Spanish or Hispanic names thereon?

A. Yes, sir.

Q. Did you make a record of each of those names?

A. Yes, I did. I computed the numbers.

Q. You testified you found 1184 names on that list?

A. Yes, sir.

Q. Of the 1184 scholastics in the Edna Independent School District of Jackson County, how many have Spanish or Hispanic names?

A. 211.

Q. 211?

A. Yes, sir.

Q. I will ask you whether or not you found that certain names on the roll had been struck?

A. Yes, sir. You could still read the names, but for some reason there had been lines drawn through them. I did not count those names.

Q. Did you observe whether or not those names that were struck out were Spanish or Hispanic?

A. I would say the large majority were Spanish names.

Q. You don't know why they were struck out?

A. No, sir, but I assume they were not on the roll and did not include them.

Q. But those were struck after you found 211 out of 1184 [fol. 115] to be Spanish names?

A. Yes, sir.

Q. Did you make a computation of the percentages?

A. No, sir, but 211 out of 1184 would be between 15 and 20 per cent. I don't know exactly right off-hand.

Examination.

By the Court:

Q. Is that for 1950?
A. It says 1950-1951. I suppose it is from 1950 through 1951. It is probably from September of 1950 through June of 1951.

Continuation of direct examination.

By Mr. Garcia:

Q. You assume that is on the basis of the scholastics at the time?
A. Yes, sir.

Cross examination.

By Mr. Hartman:

Q. This list you just now computed from or referred to made no distinction between Latin American children and children of other nationalities?
A. No, sir.
Q. It is designated the list of white students?
A. Yes, sir.
Q. And Latin American or Mexican children are on that list too?
A. Yes, sir.
Q. You don't know, of course, how many Negro scholastics there are?
A. No, sir.

[fol. 116] Re-direct examination.

By Mr. Garcia:

Q. Do you know what the purpose of the census roll is?
A. To compute the number of children going to school in the School District.
Q. To be sent to Austin, if you know?
A. Well, I suppose the State does have the State list, but I don't know what it is for.

[fols. 117-118] Reporter's Certificate to foregoing transcript omitted in printing.

[fols. 119-121] In District Court of Jackson County

Agreement of Counsel

[Title omitted]

We, the undersigned, attorneys of record for the State of Texas and the Defendant in the above numbered and entitled cause, do hereby agree that the foregoing pages numbered from 1 through 79 constitute a full, true and correct transcript of all the evidence adduced and proceedings had in connection with the hearing on motions presented by the defense on October 4, 1951, in such cause in so far only as the same relative to (1) Defendant's Motion to Quash the Indictment and (2) Defendant's Motion to Quash the Jury Panel, together with all the objections to the admission or exclusion of evidence, and the rulings of the Court on such objections; and we do further agree that said pages numbered from 1 through 79 may be filed as the Statement of Facts, in question and answer form, in connection with such hearing in so far only as the same relatives to the Motions enumerated above.

Dated this the 13th day of March, A. D. 1952.

(S.) Wayne L. Hartman, Counsel for the State of Texas; Gus C. Garcia, Counsel for Defendant.

[fol. 122] IN DISTRICT COURT OF JACKSON COUNTY

[Title omitted]

TRANSCRIPT OF HEARING ON MOTION TO QUASH THE INDICTMENT, MOTION TO QUASH JURY PANEL, AND MOTION TO QUASH THE TALESMEN AFTER SPECIAL VENIRE WAS EXHAUSTED—October 8, 1951

APPEARANCES:

Mr. Wayne L. Hartman, District Attorney, 24th Judicial District of Texas, Cuero, Texas,
Mr. Cullen B. Vance, County Attorney, Jackson County, Edna, Texas,
Mr. Wm. H. Hamblen, Special Prosecutor, Edna, Texas,
Appearing for The State of Texas;

Mr. Gus C. Garcia, 432 International Building, San Antonio, Texas,
Mr. John J. Herrera, 710 Scanlan Building, Houston, Texas,
Appearing for the Defendant.

[fol. 123] Whereupon, in said cause the following, among other, proceedings were had in the absence of the jury, to-wit:

COLLOQUY

Mr. Garcia: At this time I should like to dictate a motion to quash the indictment first based on the same grounds as I set out in my motion to quash the indictment and my motion to quash the entire jury panel.
Court: Overruled.
Mr. Garcia: Note our exception.
Mr. Garcia: I want to introduce a photograph of the sign at the privy alluded to.
Court: All right.
Court: I am calling the case of The State of Texas versus Pete Hernandez. What does the State say?
Mr. Hartman: The State is ready.
Court: What does the defense say?
Mr. Garcia: The defendant is ready.

[fol. 124] Reporter's Note: At this point the Cou-t administered the following oath to the special veniremen: "You, and each of you, solemnly swear that you will make true answers to such questions as may be propounded to you by the Court, or under its direction, touching your service and qualification as a juror, so help you God."

Court (Addressing counsel for the respective parties): Are you ready to proceed with the examination?

Mr. Hartman: Yes, sir.

Mr. Garcia: Yes, sir.

Reporter's Note: Thereupon each special venireman was examined by counsel for the respective parties separate and apart from the other special veniremen, and when such examination was concluded late on October 9, 1951, only 11 jurors had been obtained. The Court thereupon administered the appropriate oath to the Sheriff, Mr. Lewis Watson, and his Deputy, Mr. —— Gabrysh, and instructed them to summon 12 talesmen to report at 9 o'clock A.M. on October 10, 1951.

Mr. Garcia: In order to preserve the record, I would like to object to this method of obtaining talesmen to supplement the regular special venire drawn by the Court.

Court: Objection overruled, and let the record show [fol. 125] that all of the jurors who were drawn were here examined, except those excused by consent, and we have only 11 jurors at this time.

The following proceedings, among others, were had in the absence of the jury, to-wit:

Reporter's Note: Counsel for each of the respective parties was furnished a list of the 12 talesmen summoned by the Sheriff and his Deputy in accordance with instructions from the Court.

Mr. Garcia: Defendant challenges the array of talesmen and moves that they be dismissed on the same grounds stated with reference to the manner in which they have been selected, which previous motion was overruled by this Honorable Court. The grounds are that it is not permissible for additional veniremen to be obtained in the manner that these talesmen have been obtained, but that they should and must be drawn from the regular panel appointed by the Jury Commissioners.

Court: Well, now, the Court will overrule the motion to quash the panel for the reasons that the Sheriff and his Deputy who summoned the additional talesmen prior to summoning such talesmen were duly sworn under Article 2119, Revised Civil Statutes, and such officers were cau- [fol. 126] tioned to summon qualified jurors and to obtain jurors from over the County generally and not in one particular locality and obtain jurors, so far as possible, who were free of bias or prejudice in the case, and the list of jurors on the special venire having been exhausted and gone through and additional talesmen being necessary to complete the jury in the case, there having been only 11 jurors taken and sworn in when the additional talesmen were ordered to be summoned.

Mr. Garcia: Note our exception.

STIPULATION

It is stipulated by counsel for the State and counsel for defendant that there is no person of Mexican or other Latin American descent or blood on the list of talesmen.

MOTION TO QUASH THE ARRAY

Mr. Garcia: Defendant further challenges the array of talesmen and moves that said array be quashed and that they be dismissed on the ground that by virtue of the fact that no person of Mexican descent or other Latin American origin was summoned as a talesman. This constitutes additional evidence of the custom, usage and practice in Jackson County, Texas, of discriminating against persons of Mexican descent, and of classing them as a group separate and apart from groups of other races or national origins [fol. 127] in that by virtue of that fact defendant, who is a person of Mexican descent, is being deprived of his Constitutional rights, particularly those guaranteed him by the 14th Amendment of the United States Constitution. In connection with this motion defendant incorporates and embodies all the allegations heretofore set out in his motion to quash the jury panel and his motion to quash the indictment and makes them a part hereof for all purposes. As additional support of this motion to establish the custom, usage and practice of discrimination against persons

of Mexican descent in Jackson County defendant offers the witness, Mrs. Chris Rosas.

Mrs. Chris Rosas, a witness called on behalf of the defendant, having been first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Garcia:

Q. Your name is Mrs. Chris Rosas?
A. Yes, sir.
Q. You are a resident of Edna?
A. For 20 years.
Q. Are you a native born citizen of the United States?
[fol. 128] A. In Victoria County, 20 miles on the other side of Victoria—McFaddin.
Q. Are you married to a resident of Edna?
A. Yes, sir.
Q. Do you have any children?
A. I have three.
Q. What are their names?
A. Chris Rosas, Jr.; Esther Rosas; Alfred Rosas.
Q. And their ages?
A. Chris is 19; Esther is 17, and Alfred is 14.
Q. In addition to your three children you have an adopted child?
A. Yes, sir.
Q. What is her name and age?
A. Mary Elizabeth Rosas, 8 months.
Q. Are you the owner of land in this community?
A. Yes, sir.
Q. You own real estate?
A. Real estate.
Q. Do you have a business in this community?
A. Yes, sir.
Q. A cafe?
A. Yes, sir.

Q. Is this Chris Rosas the same Chris Rosas who graduated from High School in Edna this year?

A. Yes, sir.

[fol. 129] Q. In June, 1951?

A. Yes, sir.

Q. You speak English fluently yourself?

A. Yes, sir.

Q. Did you teach your children English at home or not?

A. I have spoken English to them since they were babies.

Q. Did you teach them English before you taught them Spanish or not?

A. We teached them both. I usually talk English and Spanish.

Q. I will ask you whether or not you attempted to enroll one or more of your children in the school in which only Anglo Americans went?

A. I attempted to enrol- Chris, Jr., in that school, but they would not accept him.

Q. When you say "they", who did you talk to?

A. I talked to Mr. Hays.

Q. Who was he?

A. He was the Superintendent.

Q. What year was that approximately?

A. The first year he went to school.

Q. How old was he?

A. Six.

Q. I will ask you whether or not Chris spoke English at the time.

A. He did.

Q. Did you tell the Superintendent your son spoke English?

[fol. 130] A. I did.

Q. And what did he tell you?

A. He told me that they did not accept any Latin Americans in that school.

Q. Where did you send your boy to school?

A. I sent him to the Latin American school and to the Academy.

Q. Why?

A. Because I did not want my boy to go to school in one room for those four years.

Q. At that time you say the school consisted of one room and one teacher teaching four grades?

A. Yes, sir. The teacher was Miss Lucille Linberg.

Q. Mrs. Rosas, do you know approximately how many children were in that one room school house?

A. No, I really don't.

Q. I will ask you, if you know, was the majority of the Latin American boys and girls enrolled in the first four grades?

A. Yes, sir.

Q. The majority of the Latin American children in Edna?

A. Yes, sir.

Q. Did you attempt to enroll any other of your children in that school?

A. The girl.

Q. What is her name?

A. Esther.

[fol. 131] Q. How old was she?

A. She was 6.

Q. How old is she now?

A. She is 17.

Q. What luck did you have with her?

A. They did not accept her either.

Q. Whom did you talk to?

A. I talked to Mr. Hays.

Q. He was still the Superintendent?

A. Yes, sir.

Q. At that time did they still have a one-room school house for four grades?

A. Yes, sir.

Q. Now, were any particular difficulties involved in getting the children into this one-room school house?

Mr. Hartman: I object. That is too general.

Court: I sustain the objection.

Q. Will you describe what the condition of this one-room school house was?

A. They did not have any conveniences inside the school house, and they have a wood stove in there, and when it rained the kids did not get in the school and the teacher

usually dismissed them when it rained because the water was so bad they could not get in the school.

Q. Did the Edna Independent School District provide [fol. 132] transportation for children of Mexican descent?

A. They not have ride. Those that came in the bus they did not accept them.

Q. I did not understand you.

A. I mean they hauled them in the——

Q. They made him ride on a separate trip from the Anglo American children and did not let them ride together?

A. Yes, that is what I mean.

Q. Now, you say you talked to Mr. Hays about getting your daughter in? I will ask you whether or not your daughter spoke English?

A. She did.

Q. When you talked to Mr. Hays what did he say?

A. He just said they did not allow Latin American kids in the school and they had a separate school until they reached the fourth grade.

Q. Do you recall when the school became a two-room school house?

A. I really don't, because I don't remember, because from then on I never did try to——

Q. Now, did you send your daughter to Victoria?

A. Victoria Academy—that is a convent.

Q. How far did she attend the Victoria Academy?

A. Until she was in the 6th grade.

Q. Did you then send her to school here?

A. Yes, sir.

Q. You mean to Edna?

[fol. 133] A. Yes, sir.

Q. You say Mr. Hays told you Latin American children were not permitted to attend this same school with Anglo American children?

A. Yes, sir; Mr. Hays told me Latin American kids were not allowed in the school until they were in the 4th grade.

Q. Do you know when the Latin American school was abolished?

A. No, I really don't know.

Examination .

By the Court:

Q. Mrs. Rosas, these occasions you are talking about when your two children started to school that you testified about, when was that? How long back was that?

A. Well, my oldest boy is 19.

Q. And when did he start school?

A. When he was 6 years old.

Q. That would be about 13 years ago?

A. Yes, sir.

Q. And about 12 years ago for the girl?

A. Yes, sir.

Q. When was that that you talked to Mr. Hays that you testified he told you your children could not attend?

A. When I started the boy to school.

Q. That was 12 or 13 years ago?

A. When he started to school.

Q. The boy?

[fol. 134] A. When he started to school.

Q. The boy?

A. The boy.

Mr. Hartman: We object to this testimony and ask that it be stricken for the reason that it is too remote in point of time in the present case that is on trial.

Court: I will refuse the motion and I will let it go in for whatever it is worth.

Cross-examination.

By Mr. Vance:

Q. Mrs. Rosas, was there any question about teaching or your son by anybody?

A. Yes, sir.

Q. Was there any question about qualification?

A. She was not qualified, because she did not teach them all the time.

Q. Did she meet the State requirements?

A. She did, but they never—I don't know if the State did or not. She just teached them some things.

Q. Her qualifications in this respect never were questioned?

A. I could not tell you, because my children did not go to school here.

Q. Didn't the students in the Latin American school get the same course of instruction as the children in the other school?

A. I could not tell you.

[fol. 135] Q. You just don't know about that?

A. No.

By Mr. Hartman:

Q. You are not undertaking to say that there was any discrimination against a person of Latin American or Mexican descent in the case we are trying?

A. I think there was discrimination.

Q. Who?

A. The town.

Q. Who?

A. The town.

Q. The whole town?

A. Yes, sir; they discriminated, the town.

Q. Who in the town? Can you give us any names?

A. I could not name any one.

Court: Are there any more questions?

Mr. Hartman: The State has no more questions.

Mr. Garcia: That is all for the defendant.

Mr. Hartman: The state has nothing further.

MOTION OVERRULED

Court: I am overruling this motion and, in doing so, I am taking into consideration the testimony that has been heretofore offered by the State in making my ruling. I am taking into consideration all the testimony offered by both [fol. 136] sides in this matter. I think it would naturally go to the merits of the motion.

[fols. 137-138] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 139] In District Court of Jackson County

[Title omitted]

Agreement of Counsel

We, the undersigned, attorneys of record for the State of Texas and the Defendant in the above numbered and entitled cause, do hereby agree that the foregoing pages numbered from 1 through 15 constitute a full, true and correct transcript of all the evidence adduced and proceedings had upon the trial of said cause on the merits beginning on October 8, 1951, in so far only as the same relate to (1) Defendant's Motion to Quash the Indictment, (2) Defendant's Motion to Quash the Jury Panel, and (3) Defendant's motion to Quash the Talesmen after the Special Venire was exhausted, together with all the objections to the admission or exclusion of evidence, and the rulings of the Court on such objections; and we do further agree that said pages numbered from 1 through 15 may be filed as the Statement of Facts, in question and answer form, in said cause only in so far as the same relate to the Motions enumerated above.

Dated this the 13th day of March, A. D. 1952.

(S.) Wayne L. Hartman, Counsel for the State of Texas; Gus C. Garcia, Counsel for the Defendant.

[fols. 140-166] In District Court of Jackson County

[Title omitted]

Judge's Certificate

I hereby approve the foregoing pages numbered from 1 through 15 as a full, true and correct statement of all the evidence adduced and proceedings had upon the trial of said cause on the merits beginning on October 8, 1951, in so far only as the same relate to (1) Defendant's Motion to Quash the Indictment, (2) Defendant's Motion to Quash the Jury Panel, and (3) Defendant's Motion to Quash the

Talesmen after the Special Venire was Exhausted, and order the same filed as the Statement of Facts, in question and answer form, in so far only as the same relates to the Motions enumerated above, on this the —— day of —— A. D. 1952.

—— ——, Judge Presiding, 24th Judicial District of Texas.

[fol. 167] (File endorsement omitted.)

[fol. 168] In the Court of Criminal Appeals of Texas

No. 25,816

Pete Hernandez, Appellant,

v.

The State of Texas, Appellee

Appeal from Jackson County

Opinion—filed June 18, 1952

Murder is the offense, with punishment assessed at life imprisonment in the penitentiary.

Appellant is a Mexican, or Latin American. He claims that he was discriminated against upon the trial of this case because members of the Mexican nationality were deliberately, systematically, and wilfully excluded from the grand jury that found and returned the indictment in this case and from the petit jury panel from which was selected the petit jury that tried the case. He sought, for said reasons, to quash the indictment and petit jury panel, claiming he had thereby been deprived of equal protection.

The action of the court in overruling the two motions presents the sole question for review.

In support of his contention, appellant relies upon the so-called rule of exclusion as announced by the Supreme Court of the United States—that is, that the long and continued failure to call members of the Negro race for jury service, where it is shown that members of that race were

available and qualified for jury service, grand or petit, constitutes a violation of due process and equal protection against members of that race.

The rule appears to have been first announced in Norris v. Alabama, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074, and since then followed. See Smith v. Texas, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84; Hill v. Texas, 316 U. S. 400, 62 S. Ct. 1159, 86 L. Ed. 1559; Cassell v. Texas, 339 U. S. 282, 70 S. Ct. 629, 94 L. Ed. 839; and Ross v. Texas, 341 U. S. 918, 71 S. Ct. 742, 95 L. Ed. 1352.

Appellant would have the above rule to extend to and apply to members of different nationalities—particularly to Mexicans.

[fol. 169] Much testimony was introduced by which appellant sought to show the systematic exclusion of Mexicans from jury service and that there were members of that nationality qualified and available for such service in Jackson County. The facts proven, however, were of no greater probative force than those stipulated by the state and the appellant, which we quote as follows:

> "The State will stipulate that for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County."
>
> "It is stipulated by counsel for the State and counsel for the defendant that there are some male persons of Mexican or Latin American descent in Jackson County who, by virtue of being citizens, householders, or freeholders, and having all other legal prerequisites to jury service, are eligible to serve as members of a jury commission, grand jury an-/or petit jury."

With reference to the petit jury, we quote the following:

> "It is stipulated by counsel for the State and counsel for defendant that there is no person of Mexican or other Latin American descent or blood on the list of talesmen."

These stipulations of necessity included the ability to read and speak the English language.

It was shown that Jackson County had a population of approximately 18,000, 15 per cent of which—a witness estimated as a "wild guess"—were Mexicans. The same witness also testified as a "rough estimate" that 6 or 7 per cent of that 15 per cent were freeholders upon the tax rolls of the county. It was shown, also, that the population of Jackson County was composed also of Bohemians, Germans, Anglo-Americans and Negroes. The relative percentages of these, however, were not estimated.

It may be said, therefore, that the facts relied upon by the appellant to bring this case within the rule of systematic exclusion are that at the time the grand jury was selected and at the time of the trial of this case there were "some male persons of Mexican or Latin American descent in Jackson County" who possessed the qualifications requisite to service as grand or petit jurors, and that [fol. 170] no Mexican had been called for jury service in that county for a period of twenty-five years.

There is an absence of any testimony here suggesting express or factual discrimination against appellant or other Mexicans in the selection, organization, or empaneling of the grand or petit jury in this case. To sustain his claim of discrimination, appellant relies only upon an application of the rule of exclusion mentioned.

In so far as this court is concerned, the question here presented was determined adversely to appellant's contention in the case of Sanchez v. State, 147 Tex. Cr. R. 436, 181 S. W. 2d 87, where we said:

> "In the absence of a holding by the Supreme Court of the United States that nationality and race bear the same relation, within the meaning of the constitutional provision (Fourteenth Amendment) mentioned, we shall continue to hold that the statute law of this State furnishes the guide for the selection of juries in the State, and that, in the absence of proof showing express discrimination by administrators of the law, a jury so selected in accordance therewith is valid." (Parentheses supplied)

Within our knowledge, no decision of the Supreme Court of the United States has been rendered which would change the conclusion just expressed.

The validity of laws of this state providing for the selection of grand or petit jurors (Arts. 333-350, C. C. P.) has never been seriously challenged. Indeed, the Supreme Court of the United States, in Smith v. Texas, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84, recognized the validity thereof when it said:

> "Here, the Texas statutory scheme is not in itself unfair; it is capable of being carried out with no racial discrimination whatsoever."

It was with this statement in mind that we said, in effect, that, in the absence of express discrimination, a jury, grand or petit, drawn in accordance with the statute law of this state was valid.

Appellant challenges the correctness of our conclusions [fol. 171] and charges that by such holding we have extended special benefits to members of the Negro race which are denied to Mexicans, thereby violating equal protection to them. Such contention calls, of necessity, for a construction of the equal protection clause of the Fourteenth Amendment to the Federal Constitution with reference to the selection of juries in state court trials and the decisions of the Supreme Court of the United States relative thereto.

The Fourteenth Amendment to the Federal Constitution in relation to equal protection[1] was adopted to secure to members of the Negro race, then recently emancipated, the full enjoyment of their freedom. Nixon v. Herndon, 273 U. S. 536, 71 L. 579, 47 S. Ct. 446; Buchanan v. Warley, 245 U. S. 60, 62 L. Ed. 149, 38 S. Ct. 16; Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567; Strauder v. West Virginia, 100

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[1] "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U. S. 303, 25 L. Ed. 664; Slaughter-House cases, 16 Wall (U. S.) 36, 21 L. Ed. 394.

While the Supreme Court of the United States had before it the question of race discrimination under the Fourteenth Amendment in the Slaughter-House cases, it appears that it was not until the case of Strauder v. West Virginia that the court had occasion to determine that race discrimination in jury organization was prohibited by the Fourteenth Amendment. In the latter case a statute of West Virginia limited jury service to white male persons. This statute was held as discriminatory against members of the Negro race and, therefore, violative of equal protection.

Following the Strauder case, the question of race discrimination in the selection of juries was before the Court [fol. 172] upon several occasions.

In Carter v. Texas, 177 U. S. 442, 44 L. Ed. 839, 20 S. Ct. 687, the rule was stated as follows:

> "Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664; Neal v. Delaware, 103 U. S. 370, 397, 26 L. Ed. 567, 574; Gibson v. Mississippi, 162 U. S. 565, 40 L. Ed. 1075, 16 S. Ct. 904."

The rule, as thus established, applies equally to petit jury selection.

For a time, and until the case of Norris v. Alabama, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074, establishment of discrimination rested upon facts showing actual or express discrimination against members of the Negro race. In the Norris case, however, the so-called rule of exclusion was announced in the following language, viz:

> "We think that the evidence that for a generation or longer no Negro had been called for service on any

> jury in Jackson County, that there were Negroes qualified for jury service, that according to the practice of the jury commission their names would normally appear on the preliminary list of male citizens of the requisite age but that no names of Negroes were placed on the jury roll, and the testimony with respect to the lack of appropriate consideration of the qualifications of Negroes established the discrimination which the Constitution forbids."

In succeeding cases this rule of exclusion was followed or adverted to in the cases of Smith v. Texas, 311 U. S. 128, 85 L. Ed. 84, 61 S. Ct. 164; Hill v. Texas, 316 U. S. 400, 86 L. Ed. 1559, 62 S. Ct. 1159; and Akins v. Texas, 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276.

The effect of the rule of exclusion is to furnish means by which proof of discrimination may be accomplished.

In the Akins case, the idea of proportional representation of races on a jury as a constitutional requisite was rejected. The basis of such rejection was pointed out in Cas- [fol. 173] sell v. Texas, 339 U. S. 282, 70 S. Ct. 629, 94 L. Ed. 839, as follows:

> "We have recently written why proportional representation of races on a jury is not a constitutional requisite. Succinctly stated, our reason was that the Constitution requires only a fair jury selected without regard to race. Obviously, the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation."

The conclusion of race discrimination expressed in the Cassell case, which is one of the latest expressions by the Supreme Court of the United States upon the subject, appears not to have been based upon the so-called rule of exclusion above mentioned but upon the conclusion that the jury commissioners appointed to select the list of names from which the grand jury was to be selected did not "familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race and color. They did not do so here, and the result has been racial discrimination."

In addition to that conclusion, the Cassell case also announced the rule that discrimination may be shown by inclusion as well as exclusion, on account of race, in jury selection.

To our minds, it is conclusive that, in so far as the question of discrimination in the organization of juries in state courts is concerned, the equal protection clause of the Fourteenth Amendment contemplated and recognized only two classes as coming within that guarantee: the white race, comprising one class and the Negro race, comprising the other class.

We said in Sanchez v. State, 243 S. W. 2d 700, that "Mexican people are not a separate race but are white people of Spanish descent." In contemplation of the Fourteenth Amendment, Mexicans are therefore members of and within the classification of the white race, as distinguished from members of the Negro race. In so far as we are advised, no member of the Mexican nationality challenges that statement. Appellant does not here do so.

[fol. 174] It is apparent, therefore that appellant seeks to have this court recognize and classify Mexicans as a special class within the white race and to recognize that special class as entitled to special privileges in the organization of grand and petit juries in this state.

To so hold would constitute a violation of equal protection, because it would be extending to members of a class special privileges not accorded to all others of that class similarly situated. Moreover, it must be remembered that no man, or set of men, has the right to require that a member of his race be a member of the grand jury that indicts him or of the petit jury that tries him. All that the Constitution, State or Federal, guarantees in that connection is that in the organization of such juries he be not discriminated against by reason of his race or color. Thomas v. Texas, 212 U. S. 278, 26 S. Ct. 338, 53 L. Ed. 512; Martin v. Texas, 200 U. S. 316, 26 S. Ct. 66, 50 L. Ed. 497; Carter v. Texas, 177 U. S. 442, 20 S. Ct. 686, 44 L. Ed. 839.

To say that members of the various nationalities and groups composing the white race must be represented upon grand and petit juries would destroy our jury system, for

it would be impossible to meet such requirement. Such, also, would destroy the rule above stated and would be tantamount to authorizing an accused to demand that a member of his nationality be upon the jury that indicts and tries him. In addition, to so hold would write into the equal protection clause proportional representation not only of races but of nationalities, which the Supreme Court of the United States has expressly rejected.

Mexicans are white people, and are entitled at the hands of the state to all the rights, privileges, and immunities guaranteed under the Fourteenth Amendment. So long as they are so treated, the guarantee of equal protection has been accorded to them.

[fols. 175-176] The grand jury that indicted appellant and the petit jury that tried him being composed of members of his race, it cannot be said, in the absence of proof of actual discrimination, that appellant has been discriminated against in the organization of such juries and thereby denied equal protection of the laws.

The judgment is affirmed.

Davidson, Judge.

(Delivered June 18, 1952)

Opinion approved by the court.

[fol. 177] IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

[Title omitted]

APPELLANT'S MOTION FOR REHEARING—filed July 2, 1952

Appellant, Pete Hernandes, moves this Court to set aside its judgment heretofore rendered herein and to enter a judgment reversing appellant's conviction in the court below and ordering the prosecution dismissed.

As this Court will remember, appellant was convicted of murder in the District Court of Jackson County, Texas, and sentenced to life imprisonment. His appeal is based solely [fol. 178] on the fact that he, a person of Mexican descent, has been denied the equal protection of the laws and

deprived of liberty without due process because persons of Mexican descent were intentionally, arbitrarily and systematically excluded from service on the grand jury which indicted him and the petit jury which convicted him. This Court rejected appellant's contentions.

Appellant bases this motion for rehearing upon the following grounds:

First

The refusal of this Court to apply the rule of exclusion announced in Norris v. Alabama constitutes "State Action" depriving appellant of his liberty without due process of law and denying him the equal protection of the laws.

It is clear from the Court's opinion in this case that it has reaffirmed the position taken in Sanchez v. State, 147 Tex. Cr. R. 436, 181 S. W. 2d 87 (1944), to the effect that, "in the absence of proof showing express discrimination by administrators of the law," it cannot be said that appellant has been discriminated against in the selection of grand and petit jurors.

Appellant admits, of course, that, as the Supreme Court of the United States observed in Smith v. Texas, 311 U. S. 128 (1941), the Texas statutes governing the organization of grand and petit juries are "capable of being carried out" with no discrimination. However, the fact that the statutory scheme is not of itself unfair is no insurance that it will be fairly administered. This Court well knows that the statutory scheme is capable of being, and in fact has been, administered in a discriminatory manner. Indeed, the State of Texas is more than adequately represented in [fol. 179] the roll call of cases in which the Supreme Court has condemned the discriminatory administration of laws which are "capable of being carried out" without discrimination if only those who administer them are willing to perform their duties fairly and impartially. Ross v. Texas, 341 U. S. 918 (1951); Cassel- v. Texas, 339 U. S. 282 (1950); Akins v. Texas, 325 U. S. 398 (1945); Hill v. Texas, 316 U. S. 400 (1942); Smith v. Texas, *supra;* Thomas v. Texas, 212 U. S. 278 (1909); Martin v. Texas, 200 U. S. 316 (1906); Carter v. Texas, 177 U. S. 442 (1900). It thus appears that, in spite of the fair nature of the Texas statutes,

jury commissioners in the various counties have, for more than half a century, made zealous efforts to administer them in a discriminatory manner and would have succeeded but for the watchful attitude of the Supreme Court of the United States.

Therefore, it cannot be said that if appellant has shown a discriminatory administration of the Texas statutes, his appeal to the protective clauses of the Fourteenth Amendment can be defeated by the fact that the Texas statutory scheme is non-discriminatory in form.

In effect, this Court has held that appellant has not shown such discriminatory administration. It clearly appears from this Court's opinion that, had appellant been a Negro, the exclusion rule announced in Norris v. Alabama, 249 U. S. 587 (1935), would have been applied. But there is no need to rely on implications which are latent in the language of this Court. We have an express statement by the Supreme Court which leaves no doubt concerning the sufficiency of the testimony in this case, were [fol. 180] appellant a Negro. In Patton v. Mississippi, 332 U. S. 463 (1947), the evidence showed that there were only 12 or 13 Negroes in the county available for jury service, as against 5,000 whites. The Supreme Court said:

> "Whatever the precise number of qualified colored electors in the county, there were some; and if it can possibly be conceived that all of them were disqualified for jury service . . . we do not doubt that the State could have proved it." 332 U. S. at 468.

Even were the Supreme Court bound, as it is not, by this Court's interpretation of the facts, the evidence here is stronger than that in the Patton case. Here there is no need for a court to demonstrate an unwillingness to presume that all of the persons of Mexican descent in Jackson County are disqualified. In this case the State stipulated, as set out on page 2 of this Court's opinion, that there were some persons of Mexican descent in the county who possessed *all* necessary qualifications for jury service.

The result of this Court's holding in this case, and in prior cases involving persons of Mexican descent, can be simply stated. There exist, in the State of Texas, one

rule of evidence for Negroes, and a different rule for persons of Mexican descent. From certain facts, this Court will conclude, in accordance with the Norris case, that there has been an arbitrary, intentional and systematic exclusion of Negroes. Given the same facts, but changing the color of the appellant, this Court refuses to find that there has been an arbitrary, intentional and systematic exclusion of persons of Mexican descent. It requires the latter to show express discrimination, and it states frankly that per- [fol. 181] sons of Mexican descent must bear this more onerous burden solely because they are not Negroes; i.e., because they are white. If a Negro shows certain facts, the burden of proving absence of discrimination shifts to the State; that is, certain facts give rise to a presumption of discrimination. A showing of the same facts by a person of Mexican descent does not impose any burden of proof of absence of discrimination on the State; that is, no presumption of discrimination arises. As this Court points out on page 5 of its opinion, the rule of the Norris case, in effect, furnishes "means by which proof of discrimination may be accomplished." Thus, it becomes patent that this Court has denied to this appellant a means of proving discrimination which is available to Negroes; and that this denial is based solely, exclusively and expressly on the fact that appellant is not a Negro. To put it in simpler terms, this Court has set up a classification based solely, exclusively and expressly on race.

Let us suppose that a Legislature enacted a statute to the effect that proof of certain facts by a Negro should give rise to certain presumptions favorable to the Negro, but that proof of the same facts by a white person should give rise to no such presumptions in favor of the white person. Can there be any doubt concerning the invalidity of such a statute? If doubt there is, even a casual reading of Omaya v. California, 332 U. S. 633 (1948), will dispel it. In the opinion delivered in this case, this Court does not discuss the validity of its judicially imposed racial classification in the light of the Oyama decision.

Even should appellant admit, as he does not, that the [fol. 182] Fourteenth Amendment, insofar as discrimination in the organization of juries is concerned, recognizes

only two groups—whites and Negroes—it does not follow that, for the purposes of formulating rules of evidence, this Court may discriminate against white persons by making the sufficiency of evidence depend on the color of the person presenting it. The Fourteenth Amendment forbids discrimination against whites, as well as against Negroes. Buchanan v. Warley, 245 U. S. 60 (1917). Appellant would also point out that the litigant injured by the discriminatory rule of evidence in the Oyama case was not a Negro. Thus, it cannot be said that, insofar as the validity of rules of evidence based solely on racial grounds is concerned, the Fourteenth Amendment recognizes only two classes, white and Negroes. And even if this untenable proposition be admitted for the purpose of argument, it does not follow that the Amendment sanctions discrimination against white persons by rules which impose upon them a burden more onerous than that placed on Negroes.

Appellant submits, therefore, that the action of this Court in establishing a rule of evidence which imposes a greater burden on appellant that is imposed on a Negro, and which does so solely, exclusively and expressly because of appellant's race, is "state action" in violation of the Fourteenth Amendment. A classification based on race is not beyond the Constitutional prohibitions merely because it is a judicial tribunal, rather than a legislature or admintrative agency, which has seen fit to make race the determining factor in selection of the rules which it applies. This is mere hornbook law.

[fol. 183] Appellant insists that, insofar as proof of the fact of intentional and systematic exclusion of persons of Mexican descent from jury service is concerned, this Court cannot, consistently with the provisions of the Fourteenth Amendment, hold that appellant has not shown such exclusion. Nor can it require that appellant bear a more onerous burden of proof than that which is borne by Negroes.

Second

Intentional, arbitrary and systematic exclusion of persons of Mexican descent from jury service, as shown in this case, deprives appellant of liberty without due process of

law and denies to him the equal protection of the laws.

This Court's opinion is based on the fact that, even if persons of Mexican descent are excluded from juries, such exclusion does not violate the provisions of the Fourteenth Amendment. Appellant suggests to this Court that such a view is based on a misinterpretation of the Fourteenth Amendment, and that some of the reasons given in support of the Court's conclusion constitute a misconception of the contentions made by appellant. Appellant believes and insists that the facts in this case show a violation of the due process and equal protection clauses of the Fourteenth Amendment.

A. *Denial of Due Process.*

As this Court points out, the Texas statutory scheme is fair on its face. It contains no provisions excluding persons of Mexican descent from jury service. The exclusion results solely from the activities of those citizens of Jackson County who were entrusted with the solemn duty of administering statutes which are capable of being enforced without dis- [fol. 184] crimination. These jury commissioners of Jackson County who have decided that our statutes are inadequate since, if administered as written, such legislation would allow persons of Mexican descent to sit on juries. In view of what apparently was construed by them as a lack of legislative wisdom and foresight, these gentle citizens of Jackson County have courageously volunteered to plug the leak in the dike and to exclude persons of Mexican descent from Jackson County juries. Can there be any doubt that such action is a violation of the due process clause of the Fourteenth Amendment. Can such doubt still linger in view of the following language by the Ninth Circuit Court of Appeals?:

> ". . . the acts of respondents were and are without authority of California law. . . . Therefore, conceding for the sake of argument that California could legally enact a law authorizing the segregation as practiced, the fact stands out unchallengeable that California has not done so. . . . By enforcing the segregation of school children of Mexican descent . . . respondents . . . have

> violated . . . the Fourteenth Amendment by depriving them of liberty and property without due process of law . . .'' Westminster School District v. Mendez, 161 F. 2d 774, 780-781 (9th Cir. 1947).

The court in the Mendez case observed that it was ''aware of no authority justifying any segregation fiat by any administrative or executive decree.'' 161 F. 2d at 780. Does this Court know of any authority justifying the exclusionary fiat by the jury commissioners of Jackson County?

B. *Denial of Equal Protection of the Laws.*

Appellant cannot agree with this Court's observation that ''it is conclusive that, in so far as the question of discrimination in the organization of juries is concerned, the equal [fol. 185] protection clause of the Fourteenth Amendment contemplated and recognized only two classes as coming within that guarantee: the white race, comprising one class, and the Negro race, comprising the other class.'' Appellant has found no decision by the Supreme Court, by the lower Federal courts, or by the courts of the other states which support such a statement. In State v. Guirlando, 152 La. 570, 93 So. 796 (1922), the Louisiana court indicated that the exclusion of persons of Italian descent from jury service would violate the Fourteenth Amendment. However, appellant does not believe that such an observation can be construed as furnishing even slight support for this Court's position.

The amendment itself, of course, does not mention juries. Nor does it contain any language from which it can be inferred, either inductively or deductively, that in jury cases it ''contemplated and recognized only two classes . . .: the white race . . . and the Negro race.'' The language of the equal protection clause is simple and direct. It provides that no State shall ''deny to any person within its jurisdiction the equal protection of the laws.'' The word ''person'' is neither preceded nor followed by any qualifying or restrictive term.

In fact, this very Court has not construed the equal protection clause in the manner indicated in its opinion in this case. In Juarez v. State, 102 Tex. Cr. R. 297, 277 S. W. 1091

(1925), this Court held that systematic exclusion of Roman Catholics from juries is proscribed by the Fourteenth Amendment. Although appellant's brief called the Juarez case to the Court's attention, it was not discussed in the Court's opinion in this case. No attempt [fol. 186] was made to explain the obvious incompatibility of this Court's holding in the Juarez case with the "two classes" theory upon which the Court bases its decision in this case. A careful reading of the Juarez opinion has elicited no facts even tending to show that the appellant there was a *Negro* Roman Catholic. How explain the Juarez case in view of this Court's language in the instant case?

This Court's "two classes" theory is squarely opposed to what is believed to be the only expression by the Supreme Court on the subject. In Strauder v. West Virginia, 100 U.S. 303 (1879), the Supreme Court said:

> "Nor, if a law be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the Amendment." 100 U. S. at 308.

Appellant readily admits that the above statement is dictum, but it is not believed that that fact can be used to give such language the character of authority for this Court's conclusion.

Perhaps this Court's "two classes" theory is based on the fact that all jury cases which have been considered by the Supreme Court have involved Negroes. But this fact cannot serve as an adequate foundation for the structure which this Court has sought to erect upon it. With but one exception, all the cases involving discrimination in the field of education which have reached the Supreme Court have involved Negroes. And, in the lone exception, the Chinese claimant was unsuccessful. Gong Lum v. Rice, 275 U. S. 78 (1927). Would this Court then extend its "two classes" theory to cases involving discrimination in the public [fol. 187] schools? The Federal courts have not reached such a conclusion. They have held that segregation of children of Mexican descent in the public schools is a denial of equal protection. Gonzales v. Sheely, 96 F. Supp. 1004

(D. C. Ariz. 1951); Mendez v. Westminster School District, 64 F. Supp. 544 (S.D. Cal. 1946), *aff'd.*, 161 F. 2d 774 (9th Cir. 1947). Before these cases were decided, a Texas court stated that arbitrary segregation of children of Mexican descent in the public schools, if shown, would be unconstitutional. Del Rio Independent School District v. Salvatierra, 33 S. W. 2d 790 (Tex. Civ. App., 1930).

The only Supreme Court pronouncements concerning the unconstitutionality of judicial enforcement of racial restrictive covenants are to be found in cases involving Negroes. Would this lead this Court to extend its "two classes" theory to these cases? A Texas court has decided otherwise. In Clifton v. Puente, 218 S. W. 2d 272 (Tex. Civ. App., 1949, err. ref'd. n. r. e.), its was held that a covenant prohibiting sale of land to persons of Mexican descent could not be enforced by Texas courts.

What, then, is peculiar about discrimination in the organization of juries that this Court can read into the Fourteenth Amendment a limitation which the Supreme Court has stated, in the Strauder case, is not there? What is so peculiar about discrimination in the organization of juries that this Court will read into the Fourteenth Amendment a limitation which the lower Federal courts, in the field of education, have held is not there, and which a Texas court has indicated is not there? What is so peculiar about discrimination in the organization of juries that this Court [fol. 188] can read into the Fourteenth Amendment a limitation which a Texas court has held, concerning judicial enforcement of racial restrictive covenants, is not there? What is so sacred about discrimination in the organization of juries that prompts this Court to shield it against the reach of the Fourteenth Amendment? What is so desirable about discrimination in the organization of juries that this Court is not impressed by the statement in Yick Wo v. Hopkins, 118 U. S. 356, 369 (1886), to the effect that the provisions of the Fourteenth Amendment "are universal in their application, to all persons under the territorial jurisdiction, without regard to any differences of race, or color, or of nationality"? What is so peculiar, so sacred, so desirable about discrimination in the selection and organization of juries that this Court will uphold the right of

grand jury commissioners to exclude persons of Mexican descent, in the face of the fact that the Supreme Court has struck down an attempt by a state legislature to exclude a white Austrian from employment? Truax v. Raich, 239 U. S. 33 (1915).

Appellant admits that the Fourteenth Amendment does not require proportional representation. But to condemn the exclusion here shown is not to impose proportional representation. The fact that Negroes have succeeded in their fight against exclusion from juries has not imposed proportional representation of Negroes. The fact that this Court has decreed that Roman Catholics may not be excluded has not imposed proportional representation of Roman Catholics.

Appellant does not contend that any percentage of jurors [fol. 189] must be persons of Mexican descent. He does not contend that he has a right to demand that a person of Mexican descent sit on the jury which indicted him or the jury which convicted him. To uphold appellant is not tantamount to giving him such rights. Upholding the right of the Negro against discrimination in the organization of juries has not given them such rights. Upholding the right of Roman Catholics against discrimination in the organization of juries has not given them such rights. Why would the extension of equal protection to appellant bring about consequences which did not result from the extension of equal protection to Negroes and Roman Catholics? Appellant does not seek proportional representation; he does not demand that persons of Mexican descent sit on any particular grand or petit jury. He merely asks that they not be systematically excluded from *all* juries. This can be achieved without destroying our jury system and without overruling the Supreme Court. It has been achieved in cases involving Negroes and Roman Catholics, and our jury system has not been destroyed.

Does this Court believe that, in every county in the State of Texas, 25 years go by without seeing a person of Mexican descent called for jury service? Does this Court, in brief, feel that the Jackson County pattern is the general pattern in Texas? Of course not. Does this Court have any information showing that in counties where "Mexicans" are

allowed to sit on juries the practice has led to the destruction of our jury system? Of course not. In all humility, appellant submits that in speaking of proportional representation and of giving a person the right [fol. 190] to demand that a person of his group be on a particular jury, this Court has done no more than to demolish a straw man of its own creation.

On page 7 of its opinion, this Court quotes the following language from Cassel- v. Texas, 339 U. S. 282, 287: "Obviously, the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation." The correctness of appellant's contention is implicit in such language. How could the number of "nationalities appearing in the ancestry of our citizens" make proportional representation impossible if, as this Court holds, persons may be excluded because of national origin? If this Court's "two classes" theory is correct, the number of nationalities found in the ancestry of our citizens is altogether irrelevant. It can present no problem, since they may be completely excluded.

On page 7 of its opinion this Court says that appellant seeks to have this Court classify "Mexicans as a special class," and to grant them "special privileges." This, the Court says, would violate the Fourteenth Amendment by "extending to members of a class special privileges not accorded to all others of that class similarly situated." What is this "special privilege" which appellant seeks? The right not to be discriminated against in the selection of jurors. Is that a special privilege, or is it a constitutional right? Appellant believes that it is the latter. Does this Court truly believe that, in Jackson County, Texas, this is a right which is not enjoyed by other members of the white race? Does this Court believe that, in Jackson County, Texas, only Negroes are allowed to serve as jurors? Does [fol. 191] this Court feel that if persons of Mexican descent were to be allowed to serve as jurors in Jackson County, Texas, they would be enjoying a "special privilege" which other white citizens in that county do not enjoy. Just what white citizens of Jackson County does this Court have in mind when it speaks of "all others of that class similarly

situated" who do not have the right to sit on juries? Unless this Court takes the position that only Negroes serve on Jackson County juries, it must conclude that white persons are allowed to serve on juries. Therefore, it follows that some white persons in Jackson County have a right which the jury commissioners have denied to persons of Mexican descent. Under such circumstances, who is enjoying a right which is not extended to "all other members of that class similarly situated" in Jackson County? Can the denial to persons of Mexican descent of a right enjoyed by other white persons be defended by references to special privileges?

Perhaps Ross v. Texas, 341 U. S. 918 (1951), represents the last attempt to deny Negroes the "special privilege" of sitting on juries. Are other members of the white race excluded? This court has considered cases involving exclusion of two groups other than Negroes: Roman Catholics and persons of Mexican descent. It has accorded the "special privilege" to Roman Catholics. Why? Because they are Roman Catholics? Is this Court saying that persons of Mexican descent may be excluded because they are not Roman Catholics? Is it establishing a classification based on religious belief? If X cannot be excluded because he is a Roman Catholic, may Y be excluded because he is not? Has [fol. 192] this Court's "two classes" theory, through some process of a sexual inbreeding, conceived and given birth to a third class?

In conclusion, let us assume that a legislature passed a law excluding persons of Mexican descent from jury service. Would such a statute be valid? Can the jury commissioners of Jackson County do what the legislature cannot do? Appellant thinks not. Does this Court think they can?

Wherefore, appellant prays that this motion be granted, that the opinion heretofore rendered by this Court in this case be withdrawn and the prior judgment of this Court be set aside, and that the judgment of the trial court be reversed and the prosecution be ordered dismissed.

Respectfully submitted, (S.) Carlos C. Cadena, 112 College Street, San Antonio, Texas; Gus C. Garcia, International Building, San Antonio, Texas.

[fol. 193] In Clerk's Office, Court of Criminal Appeals, Austin, Texas

Certification to Order Overruling Motion for Rehearing
October 22, 1952

I, Glenn Haynes, Clerk of the Court of Criminal Appeals of Texas, at Austin, do hereby certify that Appellant's Motion for Rehearing in Cause No. 25,816

Pete Hernandez

vs.

The State of Texas

was, on October 22, 1952, overruled without written opinion.

Witness my hand and seal of said Court, this 17th day of January, A. D. 1953.

Glenn Haynes, Clerk, Court of Criminal Appeals.

[fol. 194] In the Court of Criminal Appeals of Texas

[Title omitted]

Minute Entries of Opinion and Order Overruling Motion for Rehearing

Opinion of Affirmance By Judge Davidson—June 18, 1952

This cause came on to be heard on the transcript of the record of the court below, and the same being inspected, because it is the opinion of the Court that there was no error in the judgment, it is ordered, adjudged, and decreed by this Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended. and that this decision be certified below for observance.

MOTION FOR REHEARING OVERRULED WITHOUT WRITTEN OPINION—October 22, 1952

This cause came on to be heard on Appellant's Motion for Rehearing, and the same being considered, it is ordered, adjudged and decreed by the Court that said motion be and the same is hereby in all things overruled.

Clerk's Certificate to foregoing papers omitted in printing.

[fol. 195] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 196] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 2, Misc.

PETE HERNANDEZ, Petitioner,

vs.

STATE OF TEXAS

ORDER ALLOWING CERTIORARI—filed October 12, 1953

The petition herein for a writ of certiorari to the Court of Criminal Appeals of the State of Texas is granted, and the case is transferred to the appellate docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of this application.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1953

No. 406

PETE HERNANDEZ, *Petitioner*

VS.

THE STATE OF TEXAS, *Respondent*

BRIEF FOR PETITIONER

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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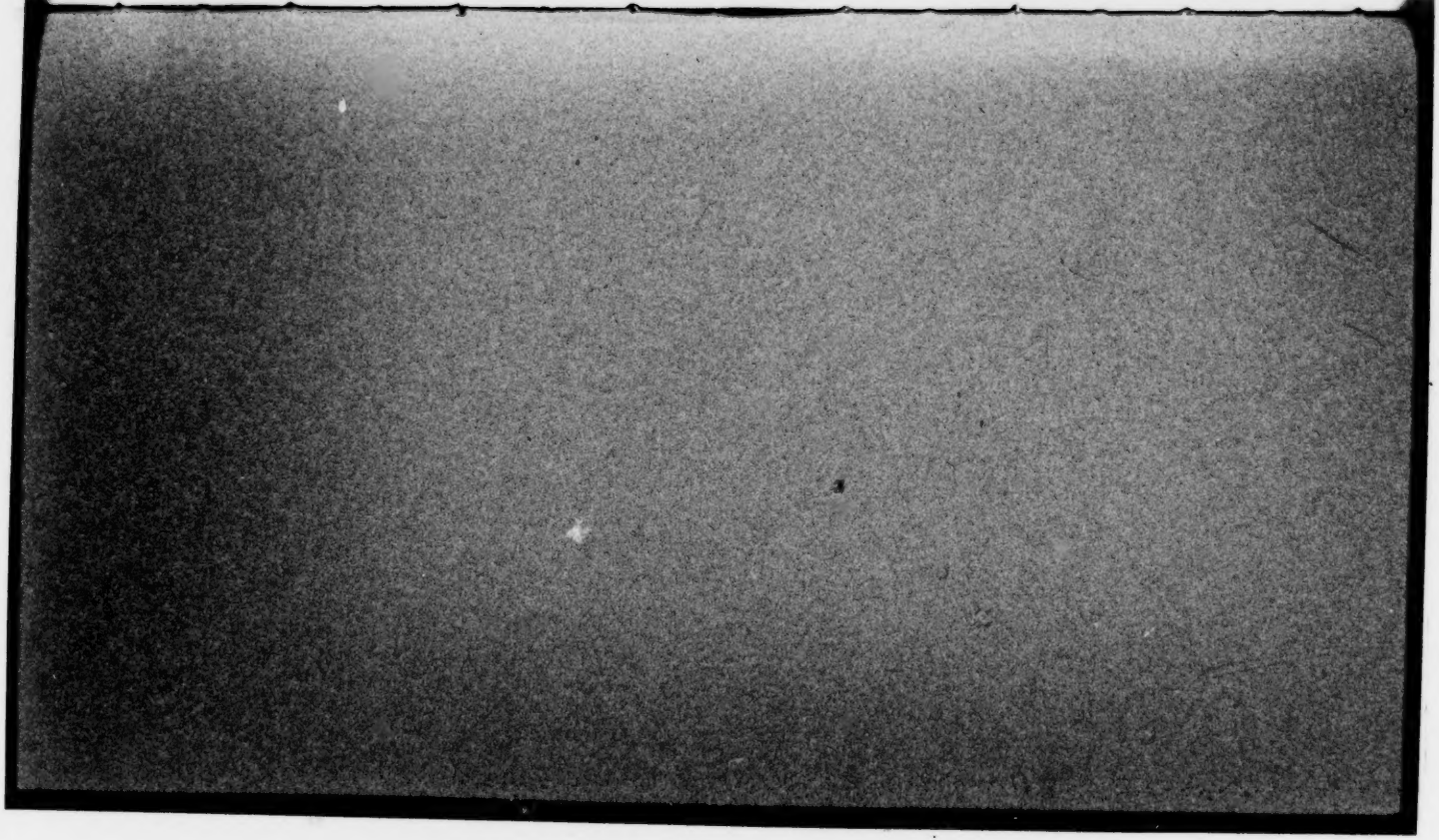

INDEX

BLEED THROUGH

III.

LIST OF AUTHORITIES

Cases

LIST OF AUTHORITIES — (Continued)

Statutes

LIST OF AUTHORITIES — (Continued)

Textbooks

Articles

Miscellaneous

VI.

STATEMENT DISCLOSING BASIS OF JURISDICTION

1. Jurisdiction is invoked under 28 U. S. C. Sec. 1257(3).

2. The judgment of the Court of Criminal Appeals of the State of Texas, court of last resort in criminal matters, was entered June 18, 1952. (R. p. 91). Motion for rehearing, timely filed, was overruled on October 22, 1952, (R. p. 111).

3. Petitioner was indicted for murder by a grand jury of Jackson County, Texas. (R. p. 1). He moved to quash the indictment because persons of his national origin were intentionally, arbitrarily and systematically excluded from service as jury commissioners and as grand jurors. (R. p. 2). Petitioner also moved to quash the jury panel because persons of Mexican descent were intentionally, arbitrarily and systematically excluded from service on all petit juries, including the one which was summoned to try petitioner. (R. p. 5). Both motions were overruled by the trial court. (R. pp. 5, 7). Petitioner was convicted and sentenced to life imprisonment. (R. p. 17). Motion for new trial was timely filed and overruled. (R. p. 21). In affirming the conviction, the Texas Court of Criminal Appeals held that petitioner had not shown intentional, arbitrary and systematic exclusion of persons of Mexican descent from jury service, and that a defendant of Mexican descent is not denied due process or equal protection of the law by the intentional, arbitrary and systematic exclusion of persons of Mexican descent from the grand

jury which indicted him and from the petit jury which convicted him. (R. pp. 91-98).

4. The conclusion of the Texas Court of Criminal Appeals presents a substantial question concerning the extent and scope of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The Texas Court of Criminal Appeals has denied to petitioner a right specially set up and claimed by petitioner under the Fourteenth Amendment to the Constitution of the United States.

5. Petition for writ of certiorari was filed in this Court on January 21, 1953 and was granted October 12, 1953. (R. p. 111).

6. The following cases sustain jurisdiction:

Strauder v. *West Virginia*, 100 U. S. 303 (1879).

Neal v. *Delaware*, 103 U. S. 370 (1880).

Norris v. *Alabama*, 294 U. S. 587 (1935).

Smith v. *Texas*, 311 U. S. 128 (1941)

Truax v. *Raich*, 239 U. S. 33 (1915).

Westminster School District v. *Mendez*, 161 F. 2d 774 (1947).

REPORT OF CASE BELOW

The opinion of the Texas Court of Criminal Appeals is reported, *sub nom. Hernandez* v. *State*, in 251 S. W. 2d 531.

BLEED THROUGH

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1953

No. 406

PETE HERNANDEZ, *Petitioner*

VS.

THE STATE OF TEXAS, *Respondent*

BRIEF FOR PETITIONER

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

QUESTIONS PRESENTED

1. Whether, in criminal proceedings against petitioner, a person of Mexican descent, the arbitrary and systematic exclusion of persons of Mexican descent from service as grand jurors and petit jurors deprives petitioner of liberty without due process of law and/or denies to him the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. Whether the Court of Criminal Appeals of the State of Texas, in denying to petitioner the benefit of the rule of exclusion announced by the Supreme Court of the United States in *Norris* v. *Alabama*, 294 U. S. 587 (1935), and in requiring petitioner, because he is not a Negro, to show express discrimination in the selection of grand jurors and petit jurors, deprived petitioner of liberty without

due process and/or denied to petitioner the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

NATURE OF THE CASE

Petitioner, a person of Mexican descent, was indicted for murder by a grand jury of Jackson County, Texas. (R., p. 1) Prior to a trial on the merits, petitioner moved to quash the indictment because persons of Mexican descent were systematically and arbitrarily excluded from service on the jury commission which selected the grand jury which indicted petitioner, and from service on such grand jury. (R., p. 2) Petitioner also filed a motion to quash the petit jury panel called for service in petitioner's case because persons of Mexican descent were arbitrarily and systematically excluded from service on such petit jury. (R., p. 3) Both of these motions were overruled by the trial court. (R., pp. 3-5). An appeal was perfected to the Court of Criminal Appeals of the State of Texas, the state court of last resort in criminal cases. The Court of Criminal Appeals affirmed the conviction. 251 S. W. 2d 531. The sentence assessed was life imprisonment. (R., p. 22) As reflected by the opinion of the state court, the action of the trial court in overruling the two motions above mentioned was the sole question presented to that court for review. (R., p. 91).

SUMMARY OF ARGUMENT

I.

The Fourteenth Amendment to the Constitution of the United States forbids the arbitrary and systematic exclusion of persons of Mexican descent from

jury service. There is no basis for the theory advanced by the Texas Court of Criminal Appeals that "in so far as the question of discrimination in the organization of juries in the state courts is concerned, the equal protection clause of the Fourteenth Amendment contemplated and recognized only two classes as coming within that guarantee: the white race, comprising one class, and the Negro race, comprising the other."

In demanding the right to participate fully in the government of their state by serving on juries, persons of Mexican descent are not demanding what the Texas court described as recognition "as a special class" which is entitled "to special privileges in the organization of grand and petit juries in the State of Texas." Petitioner merely demands a right which is accorded to all: the right to a trial by a fair and impartial jury from which persons of his national origin are not arbitrarily and systematically excluded.

The recognition of petitioner's constitutional right will not, as the Texas court fears, "destroy our jury system"; nor will such recognition write into the equal protection clause "the proportional representation . . . of nationalities."

II.

In *Norris* v. *Alabama*, 294 U. S. 587 (1935), this Court held that the unexplained absence of Negroes from juries over a long period of time, when there were in the county Negroes eligible for jury service, constituted proof of discrimination in the selection of juries. Petitioner presented such proof

with reference to persons of Mexican descent in Jackson County, Texas. By refusing to give to petitioner, solely because he is not a Negro, the benefit of the evidentiary rule which operates in favor of Negroes upon the establishment of similar facts, the Texas court has established a rule of evidence which imposes on petitioner a more onerous burden of proof than is imposed on Negroes, and which does so solely, expressly and exclusively because petitioner is not a Negro. The promulgation of an evidentiary rule founded exclusively on a classification based on race deprives petitioner of his liberty without due process of law and deprives him of the equal protection of the laws.

ARGUMENT

I.

INTENTIONAL, ARBITRARY AND SYSTEMATIC EXCLUSION OF PERSONS OF MEXICAN DESCENT FROM JURY SERVICE DEPRIVES PETITIONER OF LIBERTY WITHOUT DUE PROCESS OF LAW AND DENIES TO HIM THE EQUAL PROTECTION OF THE LAWS.

The Texas Court of Criminal Appeals is firmly committed to the view that exclusion of persons of Mexican descent from jury service does not violate the provisions of the Fourteenth Amendment. One of the earlier enunciations of this view is to be found in *Salazar* v. *State*, 149 Tex. Crim. Rep. 260, 193 S. W. 2d 211 (1946). In that case, the Texas court said:

> "The complaint is made of discrimination against nationality, not race. The Mexican people are of the same race as the grand jurors.

> We see no question presented for our decision under the Fourteenth Amendment." 193 S. W. 2d 211, 212.

This position was reaffirmed in 1951, when the Texas court held that exclusion of persons of Mexican descent raised no constitutional question, since they "are not a separate race, but are white people of Spanish descent." *Sanchez* v. *State*, 243 S. W. 2d 700, 701.

In the case now before this Court, the Texas court said:

> "In contemplation of the Fourteenth Amendment . . . Mexicans are members of and within the classification of the white race, as distinguished from members of the Negro race." 251 S. W. 2d 531, 535. (R., p. 97).

Again:

> "It is apparent, therefore, that appellant seeks to have this court recognize and classify Mexicans as a special class within the white race and to recognize that special class as entitled to special privileges in the organization of grand and petit juries in this state." 251 S. W. 2d 531, 535. (R., p. 97).

And again:

> "To our minds, it is conclusive that, in so far as the question of discrimination in the organization of juries in state courts is concerned, the equal protection clause of the Fourteenth Amendment contemplated and recognized only two classes as coming within that guarantee: the white race, comprising one class, and the Negro race, comprising the other class." 251 S. W. 2d 531, 535. (R., p. 97).

There can be no doubt that, as far as the Texas court is concerned, the Fourteenth Amendment does not prohibit discrimination in the selection of juries because of national origin or, as the Texas court calls it, "nationality."[1] Applications of this view are to be found in the following cases, each of which involved exclusion of persons of Mexican descent: *Ramirez* v. *State*, 119 Tex. Crim. Rep. 362, 40 S. W. 2d 138 (1931), *cert. denied*, 284 U. S. 659 (1931); *Carrasco* v. *State*, 130 Tex. Crim. Rep. 392, 95 S. W. 2d 433 (1936); *Sanchez* v. *State*, 147 Tex. Crim. Rep. 436, 181 S. W. 2d 87 (1944); *Bulsillos* v. *State*, 152 Tex. Crim. Rep. 275, 213 S. W. 2d 837 (1948).

Petitioner submits that the view of the Texas court rests upon a misinterpretation of the Fourteenth Amendment, and that some of the reasons given by the state court in support of its conclusions in this case constitute a misconception of the contentions made by petitioner. Petitioner believes and insists that intentional, systematic and arbitrary exclusion of persons of Mexican descent from jury service violates the due process and equal protection clauses of the Fourteenth Amendment.

A. *Denial of Due Process.*

As this Court has pointed out, the Texas statutory scheme governing the organization of juries in state courts is fair on its face and is capable of being carried out with no discrimination whatever. *Smith* v. *Texas*, 311 U. S. 128 (1941). The exclusion of persons of Mexican descent from jury service in this

1. The use of the term "nationality" by the Texas court is questionable usage. Petitioner does not contend that Mexican citizens have the right to sit on Texas juries. The use of the term "Mexicans" is also incorrect from the point of view of citizenship. Except when quoting the Texas court, the term "persons of Mexican descent" is used throughout this brief.

case results solely from the actions of those citizens of Jackson County, Texas, who were entrusted with the solemn duty of administering, in a fair and impartial manner, statutes which are capable of being administered without discrimination. The jury commissioners of Jackson County have taken it upon themselves to exclude persons of Mexican descent from juries. That such action is a violation of the due process clause of the Fourteenth Amendment becomes apparent when it is examined in the light of the following language by the Court of Appeals for the Ninth Circuit:

> ". . . The acts of respondents were and are without authority of California law . . . Therefore, conceding for the sake of argument that California could legally enact a law authorizing the segregation as practiced, the fact stands out unchallengeable that California has not done so . . . By enforcing the segregation of school children of Mexican descent . . . respondents . . . have violated . . . the Fourteenth Amendment by depriving them of liberty and property without due process of law . . ." *Westminster School District* v. *Mendez*, 161 F. 2d 774, 780-781.

The court in the *Mendez* case observed that it was "aware of no authority justifying any segregation fiat by any administrative or executive decree." 161 F. 2d at 780. Is there any authority justifying the exclusionary fiat by the jury commissioners of Jackson County?

B. *Denial of Equal Protection of the Laws.*

Petitioner cannot agree with the view of the Texas court that, insofar as the organization of

juries in state courts is concerned, "the equal protection clause of the Fourteenth Amendment contemplated and recognized two classes as coming within that guarantee: the white race, comprising one class, and the Negro race, comprising the other class." Petitioner has found no decision by this Court, by the lower Federal courts, or by the courts of any other state which will support such a conclusion. The conclusion of the Texas Court is supported only by its own decisions.

Petitioner has found no decision by this Court dealing with the exclusion of persons from juries because of national origin. With but one exception,[2] all decisions by this Court concerning the exclusion of ethnic groups from jury service have involved the exclusion of Negroes. Apparently, all of the cases considering the question of exclusion because of national origin in which a definitive decision has been made have arisen in Texas and have involved exclusion of persons of Mexican descent.[3]

The only expression by this Court dealing with exclusion from juries because of national origin seems to be the following dictum uttered in *Strauder* v. *West Virginia*, 100 U. S. 303, 308 (1879):

> "Nor, if a law be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment."

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2. In the lone exception, a person of Japanese descent complained that members of his race were not allowed to serve as jurors. But there the exclusion was because of citizenship, and not because of race or National origin. In re *Shibuya Jugiro*, 140 U. S. 291 (1891).

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3. In *State v. Guirlando*, 152 La. 570, 93 So. 796, the Louisiana court indicated that the intentional exclusion of persons of Italian descent from jury service would be unconstitutional.

The Texas court's "two classes" theory is obviously inconsistent with this Court's statement to the effect that the provisions of the Fourteenth Amendment "are universal in their application, to all persons under the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." *Yick Wo* v. *Hopkins*, 118 U. S. 336, 369 (1886). And how would the "two classes" theory explain the direct holding by this Court that a state statute which imposed discrimination in employment against a white Austrian violated the Fourteenth Amendment? *Traux* v. *Raich*, 239 U. S. 33 (1915).

The plain truth is that, in announcing its "two classes" theory, the Texas court is reading into the Fourteenth Amendment a limitation which is not there.

In fact, the Texas court has not uniformly construed the equal protection clause of the Fourteenth Amendment in the manner indicated by its opinion in this case. In *Juarez* v. *State*, 102 Tex. Crim. Rep. 297, 277 S. W. 1091 (1925), the Texas court held that systematic exclusion of Roman Catholics from juries is proscribed by the Fourteenth Amendment. A careful reading of the opinion in the *Juarez* case has uncovered no facts even tending to show that the defendant in that case was a *Negro* Roman Catholic. The *Juarez* case, although called to the attention of the Texas court by petitioner in his brief filed in that court, is not discussed in the Texas court's opinion in this case. No attempt was made by the Texas court to explain the obvious incompatability of the holding in the *Juarez* case with the decision in this

case. In order to explain the *Juarez* decision, the "two classes" theory, through some process of asexual inbreeding, must give birth to a third class.

Would the "two classes" theory be extended to cases involving discrimination in the field of education? The lower Federal courts have held that segregation of school children of Mexican descent violates the Fourteenth Amendment. *Gonzalez* v. *Sheely*, 96 F. Supp. 1004 (D. C. Ariz., 1951); *Mendez* v. *Westminster School District*, 64 F. Supp. 544 (S. D. Cal., 1946), *aff'd.*, 161 F. 2d 774 (9th Cir., 1947). Before these cases were decided, a Texas court stated that arbitrary segregation of children of Mexican descent in public schools, if shown, would violate the Fourteenth Amendment. *Del Rio Independent School District* v. *Salvatierra*, 33 S. W. 2d 790 (Tex. Civ. App., 1930).

Would the "two classes" theory be extended to cases involving judicial enforcement of covenants restricting sale of land to members of certain ethnic groups? A Texas court has held that the Fourteenth Amendment forbids judicial enforcement of a covenant prohibiting sale of land to persons of Mexican descent. *Clifton* v. *Puente*, 218 S. W. 2d 272 (Tex. Civ. App., 1949, err. ref'd.).

To petitioner's knowledge, the "two classes" theory has not been applied in any type of case involving discrimination or segregation except by the Texas Court of Criminal Appeals in cases involving exclusion of persons of Mexican descent from jury service. True, the Texas court limits its unique theory to cases involving discrimination in the

organization of juries in state courts. But there is no apparent reason for the application of a unique rule in the jury exclusion cases. The Fourteenth Amendment itself does not mention juries. The language of the equal protection clause is simple and direct. It provides that no state "shall deny to any person within its jurisdiction the equal protection of the laws." The word "person" is neither preceded nor followed by any restrictive adjective.

What is so sacred about discrimination in the organization of juries which requires a reading into the Fourteenth Amendment of a limitation which this Court said, in the *Strauder* case, is not there? What is so desirable about discrimination in the organization of juries which would prompt a court into reading into the Fourteenth Amendment a limitation which the lower Federal courts have held, in the field of education, is not there, and which a Texas court has said is not there? What is so peculiar about discrimination in the organization of juries which requires a court to read into the Fourteenth Amendment a limitation which a Texas court, concerning the enforcement of restrictive covenants, has held is not there? What is so sacred, so desirable and so peculiar about such discrimination that the Texas court is moved to ignore the statement by this Court in *Yick Wo* v. *Hopkins* that the provisions of the Fourteenth Amendment "are universal in their application . . . without regard to any differences of . . . nationality"? 118 U. S. at 369.

Further illustration of the unsoundness of the "two classes" theory is to be found in the cases hold-

ing that exclusion of members of defendant's political party, or faction thereof, constitutes discrimination. *Kentucky* v. *Powers*, 139 Fed. 452 (C. C. E. D. Ky., 1905), *rev'd on another ground*, 201 U. S. 1 (1906); *State* v. *McCarthy*, 76 N. J. L. 295, 69 Atl. 1075 (Sup. Ct., 1908). In both of these cases the decision was based on the equal protection clause of the Fourteenth Amendment.

This Court has held that the exclusion of daily wage earners from petit jurors in Federal courts was reversible error. *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217 (1946). And in *Ballard* v. *United States*, 329 U. S. 187 (1946), this Court held that where women were qualified to serve on juries under state law, they could not be excluded from juries in Federal courts. Petitioner admits that in those cases the decisions were based on the fact that the exclusions shown amounted to an improper administration of justice. But in both cases this Court was concerned with upholding the tradition that trial by jury contemplates an impartial jury from a cross section of the community. The following language from the *Thiel* case is significant:

> "The American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community . . . This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community . . . But it does mean that prospective jurors should be selected by court officials without systematic and intentional exclusion of any of these groups. Jury competence is an individual rather than a class

matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury." 328 U. S. at 220.

Certainly, the Fourteenth Amendment requires that the criminal procedure of the state be such as to assure to a defendant a fair trial. For example, a defendant is denied his constitutional rights if he is tried by a prejudiced judge. *Tumey* v. *Ohio*, 273 U. S. 510 (1927). The requirement of an impartial jury is closely analogous. See Ex parte *Wallace*, 24 Cal. 2d 933, 152 P. 2d 1 (1944). Can it be said that in a county where, over a period of 25 years, no persons of Mexican descent have been called for jury service, a person of such descent is afforded a trial by a fair and impartial jury? This Court must bear in mind that, until shortly before petitioner's trial, several places catering to the public displayed signs reading: "No Mexicans." This Court cannot overlook the fact that in the county in which petitioner was tried up to three or four years before this trial, children of Mexican descent were segregated in the public schools. Perhaps there is some significance in the fact that in the court house of Jackson County, Texas, judicious use of a sign in the Spanish language was calculated to direct persons of Mexican descent to the public rest room facilities furnished for Negroes. (R., pp. 38, 44, 75).

The blunt truth is that in Texas, persons of Mexican descent occupy a definite minority status. They are subject to discrimination in employment. Marden, *Minorities in American Society*, 140

(1952). In an estimated 50 Texas counties with a large population of persons of Mexican descent, persons of Mexican descent have never been known to be called for jury service. Kibbe, *Latin-Americans in Texas*, 229 (1946). They are frequently denied access to public places and facilities. McDonagh & Richards, *Ethnic Relations in the United States*, 179 (1953). Children of Mexican descent have been segregated in the public schools. The recent end of this practice in Jackson County, Texas, is perhaps explainable by the fact that in 1948 a Federal District Court in Texas ruled that such segregation violated the Fourteenth Amendment.[4] As late as May 8, 1950, the Texas State Board of Education found it necessary to issue an order specifically directing compliance with this ruling throughout the state. Marden, *Minorities in American Society*, 149.

It is against this background that this Court should consider the statement by the Texas court that petitioner seeks to have "Mexicans" recognized as a "special class within the white race" which is "entitled to special privileges" in the organization of juries. This "special privilege" of which the Texas court speaks is the right to be free from discrimination in the selection of juries. To eliminate such discrimination, according to the Texas court, would violate the Fourteenth Amendment by "extending to members of a class special privileges not accorded to all others of that class similarly situated." 251 S. W. 2d 531, 535. The "class" of which the court speaks is composed of members of the white race. The Texas

4. *Delgado v. Bastrop Ind. School Dist.*, Civ. Cause No. 338 (W. D. Tex., 1948). The court's judgment in this unreported case is reprinted in Sanchez, *Concerning Segregation of Spanish-Speaking Children*, 72-73 (IX *Inter-American Education Occasional Papers*, University of Texas, 1951)

court is apparently under the impression that, in Jackson County, Texas, only Negroes are allowed to serve as jurors. Unless the Texas Court of Criminal Appeals thinks that only Negroes are allowed to serve as jurors in Jackson County, it is impossible to see how elimination of discrimination against persons of Mexican descent would give to this "special class" any "special privileges" which are not enjoyed by other members of the white race in Jackson County. Can the denial to persons of Mexican descent of a right enjoyed by "all others of that class similarly situated" be defended by reference to imaginary "special privileges"?

Petitioner readily admits that the Fourteenth Amendment does not require proportional representation of the component ethnic groups of a community on juries. But to condemn the exclusion shown in this case is not tantamount to imposing proportional representation. The fact that Negroes have succeeded in their fight against exclusion from juries has not imposed proportional representation of Negroes. The fact that the Texas court has held that Roman Catholics may not be systematically excluded has not imposed proportional representation of Roman Catholics.

Petitioner does not contend that any proportion of jurors must be persons of Mexican descent. He does not contend that he has a right to demand that persons of Mexican descent should sit as members of the grand jury which indicted him, or of the petit jury which convicted him. Upholding the rights of Negroes and Roman Catholics to sit on juries has not

given these groups any such rights. To uphold petitioner in this case would not give such rights to persons of Mexican descent. No reason is given why the extension of equal protection to petitioner would bring about consequences which did not result from the extension of equal protection to Negroes and Roman Catholics.

Petitioner does not demand that persons of Mexican descent sit on any particular jury. He merely asks that they not be systematically excluded from *all* juries. This can be achieved without destroying our jury system and without violating the Fourteenth Amendment. It has been achieved in Texas in cases involving Negroes and Roman Catholics, and the jury system has not been destroyed.

With all due deference to the Texas court, petitioner submits that, in talking of proportional representation and of giving to petitioner the right to demand that a person of Mexican descent be on a particular jury, the Texas court was demolishing a straw man of its own creation. In view of the undoubted minority status of persons of Mexican descent in Texas, it is at least mildly ironic for the Texas court to uphold the discriminatory practice of which petitioner complains by pointing out that, after all, persons of Mexican descent are members of the dominant "class" in Texas. (See Appendix B).

Petitioner believes that the following language, in *Cassel* v. *Texas*, 339 U. S. 282, 287 (1950), is pertinent: "Obviously, the number of races and nationalities appearing in the ancestry of our citizens

would make it impossible to meet a requirement of proportional representation." The correctness of petitioner's contention is implicit in such language. How could the "number of . . . nationalities appearing in the ancestry of our citizens . . . make it impossible to meet a requirement of proportional representation" if, as the Texas court holds, persons may be excluded from jury service because of national origin? If the Texas court's "two classes" theory is correct, the number of nationalities appearing in the ancestry of our citizens is altogether irrelevant. It can present no problem, since persons may be systematically excluded from jury service because of their national origin.

Finally, let us assume that the Texas legislature passed a statute excluding persons of Mexican descent from jury service. Would such legislation be constitutional? Obviously not. Can the jury commissioners of Jackson County, Texas, do what the state legislature cannot do? Petitioner thinks not.

II

WHERE IT IS SHOWN THAT, OVER A PERIOD OF TWENTY-FIVE YEARS, NO PERSONS OF MEXICAN DESCENT HAVE BEEN CALLED FOR JURY SERVICE, ALTHOUGH MEMBERS OF SUCH ETHNIC GROUP WERE AVAILABLE AND QUALIFIED FOR JURY SERVICE, SUCH EVIDENCE ESTABLISHES THE INTENTIONAL, ARBITRARY AND SYSTEMATIC EXCLUSION OF PERSONS OF MEXICAN DESCENT, AND THE FAILURE OF THE TEXAS COURT OF CRIMINAL APPEALS TO

APPLY THE "RULE OF EXCLUSION" ANNOUNCED BY THE SUPREME COURT OF THE UNITED STATES IN NORRIS V. ALABAMA, 294 U. S. 587 (1935), DEPRIVES PETITIONER OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW AND DENIES TO HIM THE EQUAL PROTECTION OF THE LAWS.

THE EVIDENCE

The Texas Court of Criminal Appeals summarizes the evidence relied on by petitioner as follows:

> "It may be said, therefore, that the facts relied upon by the appellant to bring this case within the rule of systematic exclusion is that at the time of the trial of this case there were 'some male persons of Mexican or Latin-American descent in Jackson County' who possessed the qualifications requisite to service as grand or petit jurors, and that no Mexican had been called for jury service in that county for a period of twenty-five years." 251 S. W. 2d 531. (R., p. 93).

Since 1930, The United States Bureau of the Census has not used the classification "Mexican" in compiling populations statistics. However, the 1950 census contains statistics concerning "persons of Spanish surname." The 1950 census figures for Jackson County, Texas, show the following facts:

1. The total population of Jackson County is 12,916.[5] Persons of Spanish surname total 1,865, of whom 1,738 are native-born citizens, and 65 are naturalized citizens.[6] Persons with Spanish sur-

5. U. S. Census, 1950, Vol. II, Part 43, p. 180.
6. *Id.*, Vol. IV, Part 3, Ch. C, p. 45.

names thus constitute about 14% of the total population of Jackson County.

2. The number of males in Jackson County aged 21 or over is 3,754.[7] Of these, 408, or approximately 11%, have Spanish surnames.[8]

3. While no separate figures are given relative to the educational attainments of males of Spanish surname, the census shows that of 645 such persons aged 25 or over, 245 have completed from 1 to 4 years of elementary schooling; 85 have completed the fifth and sixth years; 35 have completed 7 years of elementary schooling; 15 have completed 8 years; 60 have completed from one to three years of high school; 5 have completed 4 years of high school; and 5 are college graduates.[9] For 20 such persons, no educational information was available.

PRESCRIBED QUALIFICATIONS FOR JURY SERVICE.

A. *Grand Jury.* (See Appendix "A")

In order to be eligible for service on Texas grand juries, a person must be a male citizen who is qualified to vote; he must be a freeholder in the state or a householder in the county; he must be of sound mind and good moral character and able to read and write; and he must not have been convicted of a felony or be under indictment for theft or any felony. Tex. Code Crim. Proc., Art. 339. While no age requirement is specified, the voting qualification impliedly

7. *Id.*, Vol. II, Part 43, p. 180.
8. *Id.*, Vol. IV, Part 3, Ch. C, p. 67.
9. *Ibid.*

limits grand jury service to persons 21 years of age or more. *Hill* v. *State*, 99 Tex. Crim. Rep., 290, 269 S. W. 90 (1925). There is no property qualification, since a "householder" is any person who is the head of a family." *Lane* v. *State*, 29 Tex. Crim. App. 310, 15 S. W. 827 (1890).

B. *Petit Jury.* (See Appendix "A")

In order to qualify as a petit juror, a person must be a male citizen, 21 years of age, who is qualified to vote and who is of sound mind, able to read and write, and either a householder in the county or a freeholder in the state. Tex. Code Crim. Proc., Arts. 612, 616. The possession of a poll tax is not a prerequisite for eligibility for service on petit juries. Tex. Code Crim. Proc., Art. 579. Oddly enough, the statutes do not require that a prospective petit juror in a criminal case be of good moral character.

ARGUMENT

In 1935, this Court announced that the long and continued failure to call members of the Negro race for jury service, where it is shown that Negroes were available and qualified for jury service, was sufficient to make out a case of discriminatory exclusion. *Norris* v. *Alabama*, 294 U. S. 587. This holding has been consistently followed by this Court. *Cassel* v. *Texas*, 339 U. S. 282 (1950); *Hill* v. *Texas*, 316 U. S. 400 (1942); *Smith* v. *Texas*, 311 U. S. 128 (1941).

A. *This Case Comes within the Rule of Norris* v. *Alabama.*

In cases involving the exclusion of Negroes, this Court has held that evidence establishing the follow-

ing facts made out a case of discriminatory exclusion:

> In a county where 1/6 of the population was colored, no Negro had served as a juror for many years. *Hale* v. *Kentucky*, 303 U. S. 613 (1938).
>
> In a county having a population of 36,881, including 2,688 Negroes, no Negro had been called for jury service in a generation, although at least 30 Negroes in the county qualified for jury service. *Norris* v. *Alabama*, 294 U. S. 587 (1935).
>
> No Negro had been called for jury service in a generation, although Negroes made up 1/6 of the population. *Norris* v. *Alabama, supra.*

In this case, as shown above, about 14% of the population of Jackson County consisted of persons of Mexican descent. In view of the census figures pertaining to the number of male citizens 21 years of age or more, and in view of the figures concerning the number of school years completed by persons of Mexican descent 25 years of age or over, it is obvious that in Jackson County there were, at the very least, 30 persons of Mexican descent qualified to serve as jurors. Cf. *Norris* v. *Alabama, supra.* While there are no figures concerning the number of poll taxes held by persons of Mexican descent, this fact is altogether irrelevant in determining qualification for service on petit juries. And yet, for a period of twenty-five years, no person of Mexican descent has served on a Jackson County jury.

In *Patton* v. *Mississippi*, 332 U. S. 463 (1947), the evidence showed that there were only 12 or 13 Negroes available for jury service in the county, as against 5,000 whites. This Court said:

> "Whatever the precise number of qualified colored electors in the county; there were some; and if it can possibly be conceived that all of them were disqualified for jury service . . . we do not doubt that the State could have proved it." 332 U. S. at 648.

To use the very language of the Texas court in this case, the facts established that there were "some male persons of Mexican descent" in Jackson County who possessed the qualifications requisite to service as jurors. 251 S. W. 2d 531, 533. Further, here there is no need for this Court to demonstrate an unwillingness to presume that all persons of Mexican descent in Jackson County are disqualified. In this case the State stipulated that there were some persons of Mexican descent who possessed *all* necessary qualifications for jury service. 251 S. W. 2d 531, 533.

B. *Refusal to Decide This Case under the Rule of Norris* v. *Alabama Denies to Petitioner the Equal Protection of the Laws.*

From the foregoing, it appears conclusively that, were petitioner a Negro, the Texas court would have been bound to reverse the conviction and order the indictment dismissed. The question in this case, then, is simply this: Does the rule of *Norris* v. *Alabama* apply to a case involving exclusion of persons of Mexican descent from jury service?

The Texas court refused to apply the aforementioned rule. Quoting from its previous decision in *Sanchez* v. *State*, 147 Tex. Crim. Rep. 436, 181 S. W. 2d 87 (1944), the Texas court said:

> " 'In the absence of a holding by the Supreme Court of the United States that nationality and race bear the same relation within the meaning of the constitutional provision (Fourteenth Amendment) mentioned, we shall continue to hold that the statute law of this State furnishes the guide for the selection of juries in this State, and that, in the absence of proof showing express discrimination by administrators of the law, a jury so selected in accordance therewith is valid.' " 251 S. W. 2d 531, 533.

In the concluding sentence of its opinion, the Texas court reiterated its position by saying that "in the absence of proof of actual discrimination," it cannot be said that petitioner was discriminated against in the selection of juries and thereby denied equal protection of the laws.

The rule of *Norris* v. *Alabama* is nothing more nor less than a rule of evidence. It creates a presumption which arises upon the showing of certain facts. As the Texas court pointed out, "the effect of the rule of exclusion is to furnish means by which proof of discrimination may be accomplished." 251 S. W. 2d 531, 535.

The effect of the Texas court's holding in this case, and in previous cases involving persons of Mexican descent, is simply this: In the State of Texas, there is one rule of evidence for Negroes, and a different rule for persons of Mexican descent. From certain facts, the Texas court will conclude, in accordance with the *Norris* case, that there has been an arbitrary, intentional and systematic exclusion of Negroes. Given the same facts, but changing the color of the accused, the Texas court refuses to find

that there has been an arbitrary, intentional and systematic exclusion of persons of Mexican descent. The Texas court requires a person of Mexican descent to show express discrimination, and it states frankly that persons of Mexican descent must bear this more onerous burden of proof solely and simply because they are not Negroes.

It is patent, therefore, that the Texas court has denied to this petitioner a means of proving discrimination which is available to Negroes; and no effort is made to disguise the fact that this denial is based solely and exclusively on the fact that this petitioner is not a Negro. To put it bluntly, the Texas court has set up a classification based solely, exclusively and expressly on race.

Let us suppose that the legislature of the State of Texas enacted a statute to the effect that proof of certain facts by a Negro should give rise to certain presumptions favorable to a Negro, but that proof of the same facts by a white person should give rise to no such presumptions in favor of the white person. Or, to bring the matter closer to the case at hand, suppose that the legislature of the State of Texas, by statute, provided that proof of long-continued absence of Negroes from juries where it is shown that there are qualified Negroes should give rise to a presumption of intentional exclusion of Negroes, but that proof of long-continued absence of persons of Mexican descent from juries should not be sufficient to overcome the presumption that the jury-selecting officials acted fairly and without prejudice. Can there be any doubt concerning the invalidity of such a statute? If doubt there is, even a casual reading of

Omaya v. *California*, 332 U. S. 633 (1948), will dispel it.

Although a thorough search of the cases has been made, no case has been found which furnishes even the semblance of support for the astounding proposition that a state court may make the outcome of litigation depend upon the race of a litigant. By making the outcome of a case depend on the applicability of a rule of evidence, and by making the applicability of the rule of evidence depend on the race or color of a litigant, the Texas court has made the outcome of a case depend on the race of the accused. The conviction in this case would have been reversed were petitioner a Negro. The conviction is affirmed because petitioner is a person of Mexican descent. Can any person sincerely believe that, as the Texas court says, the equal protection clause of the Fourteenth Amendment not only permits, but compels such an incongruous rule of law?

Even should petitioner admit, as he does not, that the Fourteenth Amendment, insofar as discrimination in the organization of state juries is concerned, contemplated only two classes—whites and Negroes—it does not follow that, in the formulation of rules of evidence, the Texas court may discriminate against white persons by making the sufficiency of the evidence depend on the color of the person presenting it. The Fourteenth Amendment prohibits discrimination against whites as well as against Negroes. *Buchanan* v. *Warley*, 245 U. S. 360 (1917). Petitioner would also point out that the litigant injured by the discriminatory rule of evidence in the *Oyama* case was not a Negro. Thus, it

cannot be said that, insofar as the validity of rules of evidence is concerned, the Fourteenth Amendment recognizes only two classes—Negroes and whites. And even if this untenable proposition be admitted for the purpose of argument, it does not follow that the Amendment sanctions discrimination against white persons by rules of evidence which imposes upon them a burden more onerous than that which is placed on Negroes.

A classification based on race is not beyond the reach of the Constitutional prohibitions merely because it is a judicial tribunal, rather than a legislature or administrative agency, which has seen fit to make race the determining factor in selecting the rules which it will apply. As this Court said in *Strauder* v. *West Virginia*, 100 U. S. 303 (1879):

> "A state may act through different agencies—either by its legislative, its executive or its judicial authorities, and the prohibitions of the amendment extend to all action of the state denying equal protection of the laws, whether it be action by one of these agencies or by another." 100 U. S. at 318.

More recently, the late Chief Justice Vinson said:

> "That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment is a proposition which has long been established by the decisions of this Court." *Shelley* v. *Kraemer*, 334 U. S. 1, 14 (1948).

Petitioner, therefore, submits that, insofar as proof of the fact of intentional and systematic exclusion of persons of Mexican descent from jury

service is concerned, the Texas court cannot, consistently with the provisions of the Fourteenth Amendment, hold that petitioner has not shown such exclusion. It cannot do so without denying to petitioner the equal protection of the laws. The unconstitutional basis for the decision of the Texas court in this case can find no justification in the fact that that court's denial of petitioner's right to the equal protection of the laws had as its objective the upholding of the unconstitutional discriminatory acts of the jury commissioners of Jackson County, Texas. A state court cannot, by adopting a discriminatory rule of evidence, weave a protective cloak behind which local jury commissioners can continue to disregard the plain mandates of the Fourteenth Amendment.

CONCLUSION

Petitioner submits that the evidence in this case establishes beyond any doubt that the jury commissioners of Jackson County, Texas, have, for at least 25 years, consciously and deliberately excluded persons of Mexican descent from jury service. To attribute the complete absence of persons of petitioner's national origin from Jackson County juries to coincidence strains all credulity. Such uniformity of result betrays the existence of a master plan. If my name appears on 14% of the lots from which repeated drawings are made over a period of 25 years, and my name is never drawn a single time, I would be more than justified in suspecting that the person doing the drawing was cheating.

By engaging in such practices, the jury commissioners have violated the constitutional rights of

this petitioner. They have denied to petitioner, and to all other persons of Mexican descent, the right to a trial by a fair and impartial jury. The Texas court's "two classes" theory is without foundation in reason; it is without support in the decisions of this or any other court. All courts which have considered the question have held that the Fourteenth Amendment forbids discrimination because of national origin. Such a theory, itself without foundation, cannot support the heavy weight of the discriminatory practices which it is forced to uphold in this case, if the decision of the Texas court is to stand.

The invalidity of the "two classes" theory becomes apparent when it is examined in the light of the minority status of persons of Mexican descent in Texas. They occupy an inferior social and economic position. The increase in the number of cases in which the Texas court has given its sanction to the practice of excluding them from jury service shows that they also occupy an inferior legal status. The Texas court has announced that it will continue to hold them in such inferior legal status until this Court compels it to do otherwise.

While the Texas court elaborates on its "two classes" theory, in Jackson County, and in other areas in Texas, persons of Mexican descent are treated as a third class—a notch above the Negroes, perhaps, but several notches below the rest of the population. They are segregated in schools, they are denied service in public places, they are discouraged from using non-Negro rest rooms. They are excluded from juries, and a Texas court upholds their exclusion by a

paternal reminder that they are members of the dominant white class. As members of the dominant class, they are chided by the Texas court for seeking "special privileges." They are told that they are assured of a fair trial at the hands of persons who do not want to go to school with them, who do not want to give them service in public places, who do not want to sit on juries with them, and who would prefer not to share rest room facilities with them, not even at the Jackson County court house. Finally, to insure that they do not succeed in their selfish demand for "special privileges," the Texas court formulates a special rule of evidence for them so that they may never gain admission to the jury box.

That the Texas statutory scheme for the selection of juries is not in itself discriminatory is recognized by petitioner. The Texas statutes do not exclude persons of Mexican descent from jury service. But this Court well knows that the Texas statutory scheme is capable of being and, in fact, has been, used in a discriminatory manner. Indeed, the State of Texas is more than proportionately represented in the roll call of cases in which this Court has condemned discriminatory administration of laws which are capable of being carried out without discrimination if only those who administer them are willing to perform their duties fairly and impartially.

Petitioner agrees with the Texas court when it says that a jury selected in accordance with the Texas statutory scheme presents no cause for complaint. If the inherent fairness of the Texas jury statutes had been accepted and applied by the jury

commissioners of Jackson County, petitioner would not be asking this Court to aid him in securing his rights. If Texas jury commissioners had seen fit to administer non-discriminatory statutes in a non-discriminatory manner, the "two classes" theory would never have been concocted.

The language of the Fourteenth Amendment is clear and direct. It states that no state "shall deny to any person within its jurisdiction the equal protection of the laws." The words "any person within its jurisdiction" clearly includes persons of Mexican descent. The Amendment guarantees to persons of Mexican descent the right to sit on juries. "If this could be refused solely on the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words." *Truax* v. *Raich*, 229 U.S. 33, 41 (1915).

All of the talk about "two classes"; all of the verbal pointing with alarm at a "special class" which seeks "special privileges" cannot obscure one very simple fact which stands out in bold relief: the Texas law points in one direction for persons of Mexican descent, like petitioner, and in another for Negroes. *Cf. Oyama* v. *California*, 332 U. S. 633, 641 (1947). Under such circumstances, can it be said that the State of Texas has accorded to petitioner the protection of equal laws? Distinctions negate equality, and "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are

founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943).

PRAYER

Petitioner, therefore, prays that the judgments of the trial court and of the Texas Court of Criminal Appeals be reversed, and that the indictment against petitioner be ordered dismissed.

Respectfully submitted,

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APPENDIX "A"

STATUTORY APPENDIX

TEXAS CODE OF CRIMINAL PROCEDURE

Organization of the Grand Jury.

Art. 333. The district judge shall, at each term of the district court, appoint three persons to perform the duties of jury commissioners who shall possess the following qualifications:

1. Be intelligent citizens of the county and able to read and write.

2. Be qualified jurors and freeholders in in the county.

3. Be residents of different portions of the county.

4. Have no suit in court which requires the intervention of a jury.

Art. 338. The jury commissioners shall select sixteen men from the citizens of different portions of the county to be summoned as grand jurors for the next term of court.

Art. 339. No person shall be selected to serve as a grand juror who does not possess the following qualifications:

1. He must be a citizen of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but whenever it is made to appear that

the requisite number of jurors who have paid their poll taxes cannot be found within the county, the court shall not regard the payment of poll taxes as a qualification for services as a juror.

2. He must be a freeholder within the State, or a householder in the county.

3. He must be of sound mind and of good moral character.

4. He must be able to read and write.

5. He must not have been convicted of any felony.

6. He must not be under indictment or other legal accusation for theft or any felony.

Art. 344. Within thirty days of the next terms of the district court and not before, the clerk shall open the envelope containing the list of grand jurors, make out a copy of the names of those selected as grand jurors, certify it under his official seal, and deliver it to the sheriff.

Art. 345. The sheriff shall summon the persons named in the list at least three days, exclusive of the day of service, prior to the first day of the term of court at which they are to serve, by giving personal notice to each juror of the time and place when and where he is to attend as a grand juror, or by leaving at his place of residence with a member of his family over sixteen years old a written notice to such juror

that he has been selected as a grand juror, and the time and place when and where he is to attend.

Art. 352. When as many as twelve men summoned to serve as grand jurors are in attendance upon the court, it shall proceed to test their qualifications as such.

Art. 354. In trying the qualifications of any person to serve as grand juror, he shall be asked:

1. Are you a citizen of this State and county, and qualified to vote in this county, under the Constitution and laws of this State?

2. Are you a freeholder in this state or a householder in this county?

3. Are you able to read and write?

Art. 355. When, by the answer of the person, it appears to the court that he is a qualified juror, he shall be accepted as such, unless it be shown that he is not of sound mind or of good moral character, or unless it be shown that he is not in fact qualified to serve as a grand juror.

Qualifications for Serving as Petit Jurors in Criminal cases. Texas Code of Criminal Procedure:

Art. 616. A challenge for cause is an objection made to a particular juror alleging some fact which renders him incapable or unfit to serve on the jury. It may be made for any one of the following causes:

1. That he is not a qualified voter in the State and county, under the Constitution and laws of the State.

2. That he is neither a householder in the county nor a freeholder in the State.

3. That he has been convicted of theft or any felony.

4. That he is under indictment or other legal accusation for theft or any felony.

5. That he is insane, or has such defect in the organs of seeing, feeling, or hearing, or such bodily or mental defect or disease as to render him unfit for jury service.

6. That he is a witness in the case.

7. That he served on the grand jury which found the indictment.

8. That he served on a petit jury in a former trial of the same case.

9. That he is related within the third degree of consanguinity or affinity to the defendant.

10. That he is related within the third degree of consanguinity or affinity to the person injured by the commission of the offense, or to the special prosecutor, if there be one.

11. That the juror has conscientious scruples in regard to the infliction of the punishment of death for crime.

12. That he has a bias or prejudice in favor of or against the accused.

13. That from hearsay or otherwise there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant as will influence him in his action in finding a verdict.

14. That he cannot read and write. This cause of challenge shall not be sustained when it appears to the court that the requisite number of jurors who are able to read and write cannot be found in the county.

Art. 616, of course, has reference to the formation of petit juries in capital cases. But Art. 632 of the Code of Criminal Procedure provides: "Challenges for cause in all criminal cases are the same as provided in capital cases in Art. 616, except cause 11 in said article."

Art. 579. Failure to pay poll tax shall not disqualify any person from jury service.

APPENDIX "B"
STATUS OF PERSONS OF MEXICAN DESCENT IN TEXAS

The Spanish-Mexican people have been in the Southwest for more than 300 years. During the Spanish-colonial period their numbers were small, and they were thinly distributed from the Gulf Coast of Texas to the Pacific. The brief period during which the Southwest was a part of the Mexican republic did little to change either the isolation, the cultural outlook, or the numbers of these people. It was the Mexican War, and the transfer of the Southwest to the United States, that made drastic changes in their way of life.[1]

In Texas, the war for independence aroused antagonisms that still descent. "Mexican" became a term of opprobium, and barriers began to be built up between those of Mexican descent and the so-called Anglos. Those barriers led to the establishment of a status for "Mexicans" like that assigned by the dominant group to the Negro.[2]

The great movement into the United States of people from Mexico during 1870-1920 accentuated these natio-racial distinctions. Today there are some 1,500,000 persons of Mexican descent in Texas, the majority of whom are citizens of the United States. There are 30 counties whose population are more than 40% of Mexican descent.[3]

Being largely of Indian blood, the Mexican immigrant was literally and sociologically highly

1. Carey McWilliams, NORTH FROM MEXICO, Lippincott, 1949.
2. Pauline Kibbe, LATIN AMERICANS IN TEXAS, U. of N. Mex. Press, 1946.
3. Lyle Saunders, THE SPANISH-SPEAKING POPULATION OF TEXAS. U. of Texas Press, 1949.

visible. That visibility became the peg upon which to hang the stereotype of the "Mexican"; and, once stereotyped, the immigrant acquired burdens which augmented his socio-economic problems and increased his sociological visibility. Thus, he fell into a vicious circle out of which he has been trying to break with only meager success.[4]

It still is not unusual to find in Texas segregated schools for "Mexican" children.[5] Often, they are barred from swimming pools, cafes, movie theatres, and even public parks.[6] In some communities there are separate American Legion Posts for "whites" and "Mexicans." Restrictive covenants limit the areas in which a person of Mexican descent may buy or rent a home.[7] These practices have been so prevalent that the Texas legislature on several occasions has considered the passage of laws prohibiting discrimination against persons of Mexican descent. Only the fear that such protection would have to be extended to Negroes also has prevented the passage of such legislation!

While legally white (anthropologically he is predominantly Indian)[8] frequently the term "white" excludes the "Mexican" and is reserved for the rest of the non-Negro population. Official forms sometimes call for the "racial" classification of "White-Negro-Mexican." Even Selective Service, during World War II, indulged in this practice for a period,

4. Eli Ginzberg and Douglas W. Bray. THE UNEDUCATED. Columbia U. Press. 1953 (Chapter 4).

5. George I. Sanchez. CONCERNING SEGREGATION OF SPANISH-SPEAKING CHILDREN IN THE PUBLIC SCHOOLS. U. of Texas Press. 1951.

6. George I. Sanchez. "Pachucos in the Making." COMMON GROUND. Autumn. 1943.

7. See Clifton v. Puente. 218 S. W. 2d 272 (Tex. Civ. App., 1949).

8. (Mexico) Secretaria de la Economia Nacional. MEXICO EN CIFRAS (ATLAS ESTADISTICO). 1934. See also: George I. Sanchez. MEXICO, A REVOLUTION BY EDUCATION. Viking. 1936.

and the Texas Department of Public Health still uses those classifications in at least one official form. It is so well recognized that Mexican-Americans are a class apart that the United States Bureau of the Census, since 1930, has been collecting data that distinguish between the two segments of the white population in Texas and the rest of the Southwest. That Bureau, as part of the 1950 Census of Population, has issued a special report, *Persons of Spanish Surname.*[9] In its *1950 United States Census of Housing,* that Bureau presents a special tabulation for people of Spanish surname.[10] The under-privileged status of this population group is quickly evidenced by these Census reports. Not only is the Mexican-American commonly regarded as a class apart, but by every objective measurement — from biological makeup to deaths from tuberculosis and from infantile diarrhea — he *is* a class apart.

The professional literature is replete with data supporting the statement that the Mexican-American is regarded as, and is, a class apart. From the pioneer surveys of Professor Paul S. Taylor, of the University of California Department of Economics, a quarter of a century ago,[11] to graduate theses written within the last year or two at the University of Texas, all evidence bears this out.

The attitude of the non-professional on the subject is well exemplified by the common practice in the Texas press of "race-labelling" this population

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9. U. S. Department of Commerce, Bureau of the Census, *SPECIAL REPORT P-E NO. 3C.*

10. U. S. Department of Commerce, Bureau of the Census, *BULLETIN H-A 45.*

11. Paul S. Taylor, AN AMERICAN-MEXICAN FRONTIER, U. of N. Carolina Press, 1932. See also: Herschel T. Manuel, THE EDUCATION OF MEXICAN AND SPANISH-SPEAKING CHILDREN IN TEXAS, U. of Texas Press, 1930.

group, just as the Negro is race-labelled. This attitude is also evidenced by the previously mentioned segregation of "Mexicans" in public schools—a practice responding not to pedagogical considerations but to the attitude of the dominant group in the community.[12]

Because of the widespread discrimination against persons of Mexican descent, Mexico at one time "blacklisted" the entire State of Texas (i. e., refused to permit Mexican contract workers to enter the State of Texas for employment). The State of Texas officially recognized the widespread mistreatment of persons of Mexican descent, citizens and aliens alike, by establishing the Texas Good Neighbor Commission in 1943.[13] The Commission was established by the State to seek to improve the relations between the two clearly recognized classes of its white population—"Anglos" and "Latins." It was hoped that, by taking this step, the State would be removed from Mexico's "blacklist." That the action was not fully successful is shown by the fact that Mexico still "blacklists" many areas in Texas and refuses to allow *braceros* (Mexican contract workers brought in under the terms of the international agreement with the United States) to work there.

It seems significant, indeed, that not only do both professional and non-professional workers in Texas recognize that persons of Mexican descent are, and are treated as, a class apart, but the State of Texas, too, concurs in that recognition. Some ten years ago the Governor issued a proclamation, and

12. Virgil Strickland and George I. Sanchez "Spanish Name Spells Discrimination," THE NATION'S SCHOOLS, January, 1948.
13. McWilliams, *op. cit.*, especially pp. 270-275.

the Legislature adopted a joint resolution, recognizing that this minority group was being subjected to discrimination. That the Good Neighbor Commission has not fulfilled its mission, and that persons of Mexican descent are still subjected to widespread discrimination as a class, was recognized by the present governor of Texas when he named the Texas Council on Human Relations (now defunct) to attempt to do unofficially and with private support, what the Good Neighbor Commission could not do as an official and publicly-supported agency of the State.

BLEED THROUGH

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 406

PETE HERNANDEZ,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

BRIEF IN OPPOSITION

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SUBJECT INDEX

INDEX OF AUTHORITIES

(Other than cited in the quoted Opinion below)

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OPINION BELOW

The opinion below of the Texas Court of Criminal Appeals (R. 91) is reported at 251 S.W. 2d 531. (Tex. Crim. 1952.)

JURISDICTION

As admitted by Petitioner on page 2 of his petition under his statement pertaining to jurisdiction, his petition for rehearing in the Texas Court of Criminal Appeals was denied October 22, 1952. Not counting that date, the 90-day period thereafter ended on January 20, 1953, but petition herein was not filed during that time nor was an extension of time had, but the petition was filed on January 21, 1953. Late filing

denied Petitioner jurisdiction in this matter.

Furthermore, Respondent has not had served on it a printed copy of the petition.

By making this response, Respondent does not waive any rule or requirement with which Petitioner should have heretofore or should now or should hereafter comply.

Respondent submits that this Court should not be required to take cognizance of this matter because same is of no importance beyond its own particular facts and has been correctly decided on adequate state grounds irrespective of any federal questions discussed.

ARGUMENT AND AUTHORITIES

Petitioner far over estimates the evidence in this case and thereupon vainly reaches for conclusions unwarranted by the facts. In the wording of his Questions Presented, Petitioner has assumed that he presented what would be considered enough evidence to show systematic exclusion from jury service. The evidence is strongly contrary to such an assumption.

In the hearing on Defendant's Motion to Quash the Indictment and Defendant's Motion to Quash the Jury Panel, some seventy-nine (79) pages of testimony were produced, wherein defendant offered six witnesses and the State of Texas offered seven witnesses, all being subjected to full cross-examination as desired by Counsel.

Much of Petitioner's testimony was about former school procedures and matters not pertinent to this inquiry. His witnesses in no instance showed that any plan had been worked nor purpose pursued

toward keeping those white persons characterized by him as Mexican or Latin American from serving on juries in Jackson County, Texas.

The State produced as witnesses all five members of the Jury Commission who had selected the Grand Jury and Petit Jury panels involved in this inquiry. Each Commissioner positively testified under oath that no discrimination was allowed in selecting the jury lists (R. 57-73). This shows full performance of all legal duties imposed by our law on these Commissioners. They are not shown to have been acting like the Commissioners in the *Cassell case*, 339 U.S. 282 (1949) who were not in that instance fulfilling their duty.

The Respondent, the State of Texas, does not condone discrimination against persons of Latin American origin as to serving on Jury Commissions, grand juries, or Petit juries. The Respondent's position in this case is that the record does not disclose systematic exclusion from jury service of Latin Americans so as to deprive Petitioner of his constitutional right of due process and equal protection of law.

Now, if in picking out 250 men from a list of several thousand, we can get men whose education, varied business experiences, constant contact with the public and clear understanding of human nature will best fit them for service on grand jury or petit jury so as to be impartial in their decisions, yet able to understand the intricacies of various situations presented to them as jurors, as has been done in

Jackson County, Texas, we have done great and good service to this fundamental institution, trial by jury.

The defendant in this case is a white man. The jury was composed of white men. No actual exclusion of the white race or any other race therefrom is shown. No discrimination against the white race or based on race or color is shown.

If we are to divide the white race into small segments such as blondes and brunettes, or redheads and others, or left handers and right handers, or Protestant and Catholic and Jew, or by economic classification, or by Irish origin, German origin, etc., then try and force our State to see that proportional or other representation of each such classification is on each trial and grand jury, we have but so encumbered the jury system as to utterly ruin it and nullify any good which might be expected from it.

No jury could be perfect, except perhaps the particular jury which acquits a man will have that standing in that man's individual views. Any jury which convicts is subject to the censure of the criminal who appeared before it.

Your decision in *Brown v. Allen*, 344 U.S. 470 (1953) has shown that this Honorable Court will not lightly upset State procedure and make forever uncertain and perplexing what rights our courts and jury system have in the administration of justice.

Certainly Petitioner has not shown one iota of discrimination against himself in the matters he tries to urge upon this Court. The jury list was from a source which reasonably reflects a cross-section of the population of Jackson County having upon it men suitable in character and intelligence for that duty, some more capable than others.

We wish to now quote the opinion of the Texas Court of Criminal Appeals rendered in this very case and reported in Vol. 251, S.W. 2d 531:

"OPINION

"Murder is the offense, with punishment assessed at life imprisonment in the penitentiary.

"Appellant is a Mexican, or Latin American. He claims that he was discriminated against upon the trial of this case because members of the Mexican nationality were deliberately, systematically, and wilfully excluded from the grand jury that found and returned the indictment in this case and from the petit jury panel from which was selected the petit jury that tried the case. He sought, for said reasons, to quash the indictment and petit jury panel, claiming he had thereby been deprived of equal protec-

"The action of the court in overruling the two motions presents the sole question for review.

"In support of his contention, appellant relies upon the so-called rule of exclusion as announced by the Supreme Court of the United States—that is, that the long and continued failure to call members of the Negro race for jury service, where it is shown that members of that race were available and qualified for jury service, grand or petit, constitutes a violation of due

process and equal protection against members of that race.

"The rule appears to have been first announced in Norris v. Alabama, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074, and since then followed. See Smith v. Texas, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84; Hill v. Texas, 316 U. S. 400, 62 S. Ct. 1159, 86 L. Ed. 1559; Cassell v. Texas, 339 U. S. 282, 70 S. Ct. 629, 94 L. Ed. 839; and Ross v. Texas, 341, U. S. 918, 71 S. Ct. 742, 95 L. Ed. 1352."

"Appellant would have the above rule to extend to and apply to members of different nationalities—particularly to Mexicans.

"Much testimony was introduced by which appellant sought to show the systematic exclusion of Mexicans from jury service and that there were members of that nationality qualified and available for such service in Jackson County. The facts proven, however, were of no greater probative force than those stipulated by the state and the appellant, which we quote as follows:

> " 'The State will stipulate that for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County.'
>
> " 'It is stipulated by counsel for the State and counsel for the defendant that there are some male persons of Mexican or Latin American descent in Jackson County who, by virtue of being citizens, householders, or freeholders, and having all other legal prerequisites to jury service, are eligible to serve as members of a jury commission, grand jury and/or petit jury.'

"With reference to the petit jury, we quote the following:

" 'It is stipulated by counsel for the State and counsel for defendant that there is no person of Mexican or other Latin American descent or blood on the list of talesmen.'

"These stipulations of necessity included the ability to read and speak the English language.

"It was shown that Jackson County had a population of approximately 18,000, 15% of which—a witness estimated as a 'wild guess'—were Mexicans. The same witness also testified as a 'rough estimate' that 6 or 7% of that 15% were freeholders upon the tax rolls of the county. It was shown, also, that the population of Jackson County was composed also of Bohemians, Germans, Anglo-Americans, and Negroes. The relative percentages of these, however, were not estimated.

"It may be said, therefore, that the facts relied upon by the appellant to bring this case within the rule of systematic exclusion are that at the time the grand jury was selected and at the time of the trial of this case there were 'some male persons of Mexican or Latin American descent in Jackson County' who possessed the qualifications requisite to service as grand or petit jurors, and that no Mexican had been called for jury service in that county for a period of twenty-five years.

"There is an absence of any testimony here suggesting express or factual discrimination against appellant or other Mexicans in the selection, organization, or empaneling of the grand or petit jury in this case. To sustain his claim of discrimination, appellant relies only upon an application of the rule of exclusion mentioned.

"In so far as this court is concerned, the ques-

tion here presented was determined adversely to appellant's contention in the case of Sanchez v. State, 147 Tex. Cr. R. 436, 181 S. W. 2d 87, where we said:

> " 'In the absence of a holding by the Supreme Court of the United States that nationality and race bear the same relation, within the meaning of the constitutional provision (Fourteenth Amendment) mentioned, we shall continue to hold that the statute law of this State furnishes the guide for the selection of juries in the State, and that, in the absence of proof showing express discrimination by administrators of the law, a jury so selected in accordance therewith is valid.' (Parentheses supplied)

"Within our knowledge, no decision of the Supreme Court of the United States has been rendered which would change the conclusion just expressed.

"The validity of laws of this state providing for the selection of grand or petit jurors (Arts. 333-350, C. C. P.) has never been seriously challenged. Indeed, the Supreme Court of the United States, in Smith v. Texas, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84, recognized the validity thereof when it said:

> " 'Here, the Texas statutory scheme is not in itself unfair; it is capable of being carried out with no racial discrimination whatsoever.'

"It was with this statement in mind that we said, in effect, that, in the absence of express discrimination, a jury, grand or petit, drawn in accordance with the statute law of this state was valid.

"Appellant challenges the correctness of our conclusion and charges that by such holding we

have extended special benefits to members of the Negro race which are denied to Mexicans, thereby violating equal protection to them. Such contention calls, of necessity, for a construction of the equal protection clause of the Fourteenth Amendment to the Federal Constitution with reference to the selection of juries in state court trials and the decisions of the Supreme Court of the United States relative thereto.

"The Fourteenth Amendment to the Federal Constitution in relation to equal protection[1] was adopted to secure to members of the Negro race, then recently emancipated, the full enjoyment of their freedom. Nixon v. Herndon, 273 U. S. 536, 71 L. 579, 47 S. Ct. 446; Buchanan v. Warley, 245 U. S. 60, 62 L. Ed. 149, 38 S. Ct. 16; Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567; Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664; Slaughter-House cases, 16 Wall (U. S.) 36, 21 L. Ed. 394.

"[1] 'Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

"While the Supreme Court of the United States had before it the question of race discrimination under the Fourteenth Amendment in the Slaughter-House cases, it appears that it was not until the case of Strauder v. West Virginia that the court had occasion to determine that race discrimination in jury organization

was prohibited by the Fourteenth Amendment. In the latter case a statute of West Virginia limited jury service to white male persons. This statute was held as discriminatory against members of the Negro race and, therefore, violative of equal protection.

"Following the Strauder case, the question of race discrimination in the selection of juries was before the court upon several occasions.

"In Carter v. Texas, 177 U.S. 442, 44 L. Ed. 839, 20 S. Ct. 687, the rule was stated as follows:

> " 'Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664; Neal v. Delaware, 103 U. S. 370, 397, 26 L. Ed. 567, 574; Gibson v. Mississippi, 162 U. S. 565, 40 L. Ed. 1075, 16 S. Ct. 904.'

"The rule, as thus established, applies equally to petit jury selection.

"For a time, and until the case of Norris v. Alabama, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074, establishment of discrimination rested upon facts showing actual or express discrimination against members of the Negro race. In the Norris case, however, the so-called rule of exclusion was announced in the following language, viz.

> " 'We think that the evidence that for a generation or longer no Negro had been called

for service on any jury in Jackson County, that there were Negroes qualified for jury service, that according to the practice of the jury commission their names would normally appear on the preliminary list of male citizens of the requisite age but that no names of Negroes were placed on the jury roll, and the testimony with respect to the lack of appropriate consideration of the qualifications of Negroes established the discrimination which the Constitution forbids.'

"In succeeding cases this rule of exclusion was followed or adverted to in the cases of Smith v. Texas, 311 U. S. 128, 85 L. Ed. 84, 61 S. Ct. 164; Hill v. Texas, 316 U. S. 400, 86 L. Ed. 1559, 62 S. Ct. 1159; and Akins v. Texas, 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276.

"The effect of the rule of exclusion is to furnish means by which proof of discrimination may be accomplished.

"In the Akins case, the idea of proportional representation of races on a jury as a constitutional requisite was rejected. The basis of such rejection was pointed out in Cassell v. Texas, 339 U. S. 282, 70 S. Ct. 629; 94 L. Ed. 839, as follows:

"'We have recently written why proportional representation of races on a jury is not a constitutional requisite. Succinctly stated, our reason was that the Constitution requires only a fair jury selected without regard to race. Obviously, the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation.'

"The conclusion of race discrimination expressed in the Cassell case, which is one of the latest expressions by the Supreme Court of the

United States upon the subject, appears not to have been based upon the so-called rule of exclusion above mentioned but upon the conclusion that the jury commissioners appointed to select the list of names from which the grand jury was to be selected did not 'familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race and color. They did not do so here, and the result has been racial discrimination.'

"In addition to that conclusion, the Cassell case also announced the rule that discrimination may be shown by inclusion as well as exclusion, on account of race, in jury selection.

"To our minds, it is conclusive that, in so far as the question of discrimination in the organization of juries in state courts is concerned, the equal protection clause of the Fourteenth Amendment contemplated and recognized only two classes as coming within that guarantee: the white race, comprising one class, and the Negro race, comprising the other class.

"We said in Sanchez v. State, 243 S. W. 2d 700, that 'Mexican people are not a separate race but are white people of Spanish descent.' In contemplation of the Fourteenth Amendment, Mexicans are therefore members of and within the classification of the white race, as distinguished from members of the Negro race. In so far as we are advised, no member of the Mexican nationality challenges that statement. Appellant does not here do so.

"It is apparent, therefore, that appellant seeks to have this court recognize and classify Mexicans as a special class within the white race and to recognize that special class as entitled to special privileges in the organization of grand and petit juries in this state.

"To so hold would constitute a violation of equal protection, because it would be extending to members of a class special privileges not accorded to all others of that class similarly situated. Moreover, it must be remembered that no man, or set of men, has the right to require that a member of his race be a member of the grand jury that indicts him or of the petit jury that tries him. All that the Constitution, State or Federal, guarantees in that connection is that in he organization of such juries he be not discriminated against by reason of his race or color. Thomas v. Texas, 212 U. S. 278, 26 S. Ct. 338, 53 L. Ed. 512; Martin v. Texas, 200 U. S. 316, 26 S. Ct. 66, 50 L. Ed. 497; Carter v. Texas, 177 U. S. 442, 20 S. Ct. 686, 44 L. Ed. 839.

"To say that members of the various nationalities and groups composing the white race must be represented upon grand and petit juries would destroy our jury system, for it would be impossible to meet such requirement. Such, also, would destroy the rule above stated and would be tantamount to authorizing an accused to demand that a member of his nationality be upon the jury that indicts and tries him. In addition, to so hold would write into the equal protection clause proportional representation not only of races but of nationalities, which the Supreme Court of the United States hsa expressly rejected.

"Mexicans are white people, and are entitled at the hands of the state to all the rights, privileges, and immunities guaranteed under the Fourteenth Amendment. So long as they are so treated, the guarantee of equal protection has been accorded to them.

"The grand jury that indicted appellant and the petit jury that tried him being composed of

members of his race, it cannot be said, in the absence of proof of actual discrimination, that appellant has been discriminated against in the organization of such juries and thereby denied equal protection of the laws.

"The judgment is affirmed.

"Davidson, Judge

"(Delivered June 18, 1952)

"Opinion approved by the court."

SPECIAL POINTS

Respondent herein specially points out that *Petitioner Pete Hernandez* with malice aforethought murdered *Joe Espinosa* (Indictment, R. 1) which shows *both the murderer and the murdered* to be of the Latin American origin as per names and that no denial of equal protection of law is shown by the record in this case, as might be otherwise vaguely inferred if the victim had been of some other national origin.

Reference to "Mexican or Latin American name" in stipulations is invalid as proof of absence of persons of Mexican or Latin American blood since it is common knowledge that many persons in the area of Texas including Jackson County, Texas, who have names other than Mexican or Latin American names are nevertheless of Mexican or Latin American blood.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 406.—October Term, 1953.

Pete Hernandez, Petitioner, *v.* The State of Texas.	On Writ of Certiorari to the Court of Criminal Appeals of the State of Texas.

[May 3, 1954.]

Mr. Chief Justice Warren delivered the opinion of the Court.

The petitioner, Pete Hernandez, was indicted for the murder of one Joe Espinosa by a grand jury in Jackson County, Texas. He was convicted and sentenced to life imprisonment. The Texas Court of Criminal Appeals affirmed the judgment of the trial court. — Tex. Crim. Rep. —, 251 S. W. 2d 531. Prior to the trial, the petitioner, by his counsel, offered timely motions to quash the indictment and the jury panel. He alleged that persons of Mexican descent were systematically excluded from service as jury commissioners,[1] grand jurors, and petit jurors, although there were such persons fully

[1] Texas law provides that at each term of court, the judge shall appoint three to five jury commissioners. The judge instructs these commissioners as to their duties. After taking an oath that they will not knowingly select a grand juror they believe unfit or unqualified, the commissioners retire to a room in the courthouse where they select from the county assessment roll the names of 16 grand jurors from different parts of the county. These names are placed in a sealed envelope and delivered to the clerk. Thirty days before court meets, the clerk delivers a copy of the list to the sheriff who summons the jurors. Vernon's Tex. Code Crim. Proc., 1948, Arts. 333-350.

The general jury panel is also selected by the jury commission. Vernon's Tex. Civ. Stat., 1942, Art. 2107. In capital cases, a special venire may be selected from the list furnished by the commissioners. Vernon's Tex. Code Crim. Proc., 1948, Art. 592.

qualified to serve residing in Jackson County. The petitioner asserted that exclusion of this class deprived him, as a member of the class, of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution. After a hearing, the trial court denied the motions. At the trial, the motions were renewed, further evidence taken, and the motions again denied. An allegation that the trial court erred in denying the motions was the sole basis of petitioner's appeal. In affirming the judgment of the trial court, the Texas Court of Criminal Appeals considered and passed upon the substantial federal question raised by the petitioner. We granted a writ of certiorari to review that decision. 346 U. S. 811.

In numerous decisions, this Court has held that it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury, or before a petit jury, from which all persons of his race or color have, solely because of that race or color, been excluded by the State, whether acting through its legislature, its courts, or its executive or administrative officers.[2] Although the Court has had little occasion to rule on the question directly, it has been recognized since *Strauder* v. *West Virginia*, 100 U. S. 303, that the exclusion of a class of persons from jury service on grounds other than race or color may also deprive a defendant who is a member of that class of the constitutional guarantee of equal protection of the laws.[3] The State of Texas would have us hold that there are only two classes—white and Negro—within the contemplation of the Fourteenth Amendment. The decisions of this Court

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[2] See *Carter* v. *Texas*, 177 U. S. 442, 447.

[3] "Nor if a law should be passed excluding all naturalized Celtic Irishmen [from jury service], would there be any doubt of its inconsistency with the spirit of the amendment." 100 U. S., at 308. Cf. *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, 92.

do not support that view.[4] And, except where the question presented involves the exclusion of persons of Mexican descent from juries,[5] Texas courts have taken a broader view of the scope of the equal protection clause.[6]

Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a "two-class theory"—that is, based upon differences between "white" and Negro.

As the petitioner acknowledges, the Texas system of selecting grand and petit jurors by the use of jury commissions is fair on its face and capable of being utilized

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[4] See *Truax* v. *Raich*, 239 U. S. 33; *Takahaski* v. *Fish & Game Commission*, 334 U. S. 410. Cf. *Hirabayashi* v. *United States*, 320 U. S. 81, 100: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."

[5] *Sanchez* v. *State*, 147 Tex. Crim. Rep. 436, 181 S. W. 2d 87; *Salazar* v. *State*, 149 Tex. Crim. Rep. 260, 193 S. W. 2d 211; *Sanchez* v. *State*, 243 S. W. 2d 700.

[6] In *Juarez* v. *State*, 102 Tex. Crim. Rep. 297, 277 S. W. 1091, the Texas court held that the systematic exclusion of Roman Catholics from juries was barred by the Fourteenth Amendment. In *Clifton* v. *Puente*, 218 S. W. 2d 272, the Texas court ruled that restrictive covenants prohibiting the sale of land to persons of Mexican descent were unenforceable.

without discrimination.[7] But as this Court has held, the system is susceptible to abuse and can be employed in a discriminatory manner.[8] The exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment. The Texas statute makes no such discrimination, but the petitioner alleges that those administering the law do.

The petitioner's initial burden in substantiating his charge of group discrimination was to prove that persons of Mexican descent constitute a separate class in Jackson County, distinct from "whites."[9] One method by which this may be demonstrated is by showing the attitude of the community. Here the testimony of responsible officials and citizens contained the admission that residents of the community distinguished between "white" and "Mexican." The participation of persons of Mexican descent in business and community groups was shown to be slight. Until very recent times, children of Mexican descent were required to attend a segregated school for the first four grades.[10] At least one restaurant in town prominently displayed a sign announcing "No Mexicans Served." On the courthouse grounds at the time of the

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[7] *Smith* v. *Texas*, 311 U. S. 128, 130.

[8] *Smith* v. *Texas*, *supra*, note 7; *Hill* v. *Texas*, 316 U. S. 400; *Cassell* v. *Texas*, 339 U. S. 282; *Ross* v. *Texas*, 341 U. S. 918.

[9] We do not have before us the question whether or not the Court might take judicial notice that persons of Mexican descent are there considered as a separate class. See Marden, Minorities in American Society; McDonagh & Richards, Ethnic Relations in the United States.

[10] The reason given by the school superintendent for this segregation was that these children needed special help in learning English. In this special school, however, each teacher taught two grades, while in the regular school each taught only one in most instances. Most of the children of Mexican descent left school by the fifth or sixth grade.

hearing, there were two men's toilets, one unmarked, and the other marked "Colored Men" and "Hombres Aqui" ("Men Here"). No substantial evidence was offered to rebut the logical inference to be drawn from these facts, and it must be concluded that petitioner succeeded in his proof.

Having established the existence of a class, petitioner was then charged with the burden of proving discrimination. To do so, he relied on the pattern of proof established by *Norris* v. *Alabama*, 294 U. S. 587. In that case, proof that Negroes constituted a substantial segment of the population of the jurisdiction, that some Negroes were qualified to serve as jurors, and that none had been called for jury service over an extended period of time, was held to constitute prima facie proof of the systematic exclusion of Negroes from jury service. This holding, sometimes called the "rule of exclusion," has been applied in other cases,[11] and it is available in supplying proof of discrimination against any delineated class.

The petitioner established that 14% of the population of Jackson County were persons with Mexican or Latin American surnames, and that 11% of the males over 21 bore such names.[12] The County Tax Assessor testified

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[11] See note 8, *supra*.

[12] The 1950 census report shows that of the 12,916 residents of Jackson County, 1,865, or about 14% had Mexican or Latin American surnames. U. S. Census of Population, 1950, Vol. II, pt. 43, p. 180; *id.*, Vol. IV, pt. 3, c. C, p. 45. Of these 1,865, 1,738 were native born American citizens and 65 were naturalized citizens. *Id.*, Vol. IV, pt. 3, c. C, p. 45. Of the 3,754 males over 21 years of age in the County, 408, or about 11% had Spanish surnames. *Id.*, Vol. II, pt. 43, p. 180; *id.*, Vol. IV, pt. 3, c. C, p. 67. The State challenges any reliance on names as showing the descent of persons in the County. However, just as persons of a different race are distinguished by color, these Spanish names provide ready identification of the members of this class. In selecting jurors, the jury commissioners work from a list of names.

that 6 or 7 percent of the freeholders on the tax rolls of the County were persons of Mexican descent. The State of Texas stipulated that "for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County." [13] The parties also stipulated that "there are some male persons of Mexican or Latin American descent in Jackson County who, by virtue of being citizens, freeholders, and having all other legal prerequisites to jury service, are eligible to serve as members of a jury commission, grand jury and/or petit jury." [14]

The petitioner met the burden of proof imposed in *Norris* v. *Alabama, supra.* To rebut the strong prima facie case of the denial of the equal protection of the laws guaranteed by the Constitution thus established, the State offered the testimony of five jury commissioners that they had not discriminated against persons of Mexican or Latin American descent in selecting jurors. They stated that their only objective had been to select those whom they thought were best qualified. This testimony is not enough to overcome the petitioner's case. As the Court said in *Norris* v. *Alabama:*

> "That showing as to the long-continued exclusion of negroes from jury service, and as to the many negroes qualified for that service, could not be met by mere generalities. If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for

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[13] R. 34.

[14] R. 55. The parties also stipulated that there were no persons of Mexican or Latin American descent on the list of talesmen. R. 83. Each item of each stipulation was amply supported by the testimony adduced at the hearing.

> the complete exclusion of negroes from jury service, the constitutional provision . . . would be but a vain and illusory requirement." [15]

The same reasoning is applicable to these facts.

Circumstances or chance may well dictate that no persons in a certain class will serve on a particular jury or during some particular period. But it taxes our credulity to say that mere chance resulted in there being no members of this class among the over six thousand jurors called in the past 25 years. The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner. The judgment of conviction must be reversed.

To say that this decision revives the rejected contention that the Fourteenth Amendment requires proportional representation of all the component ethnic groups of the community on every jury [16] ignores the facts. The petitioner did not seek proportional representation, nor did he claim a right to have persons of Mexican descent sit on the particular juries which he faced.[17] His only claim is the right to be indicted and tried by juries from which all members of his class are not systematically excluded—juries selected from among all qualified persons regardless of national origin or descent. To this much, he is entitled by the Constitution.

Reversed.

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[15] 294 U. S., at 598.

[16] See *Akins* v. *Texas*, 325 U. S. 398, 403; *Cassell* v. *Texas*, 339 U. S. 282, 286–287.

[17] See *Akins* v. *Texas*, *supra*, note 16, at 403.